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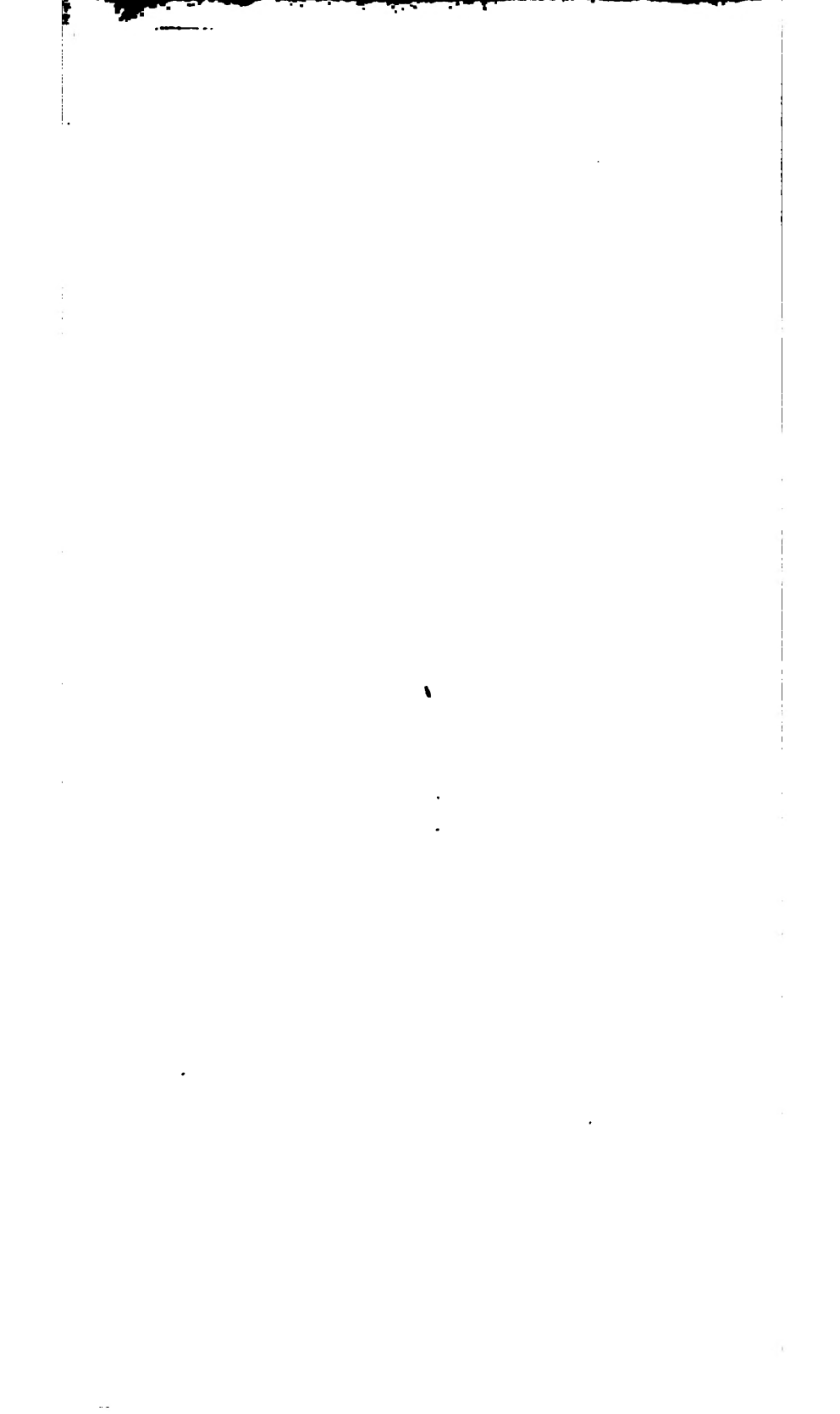
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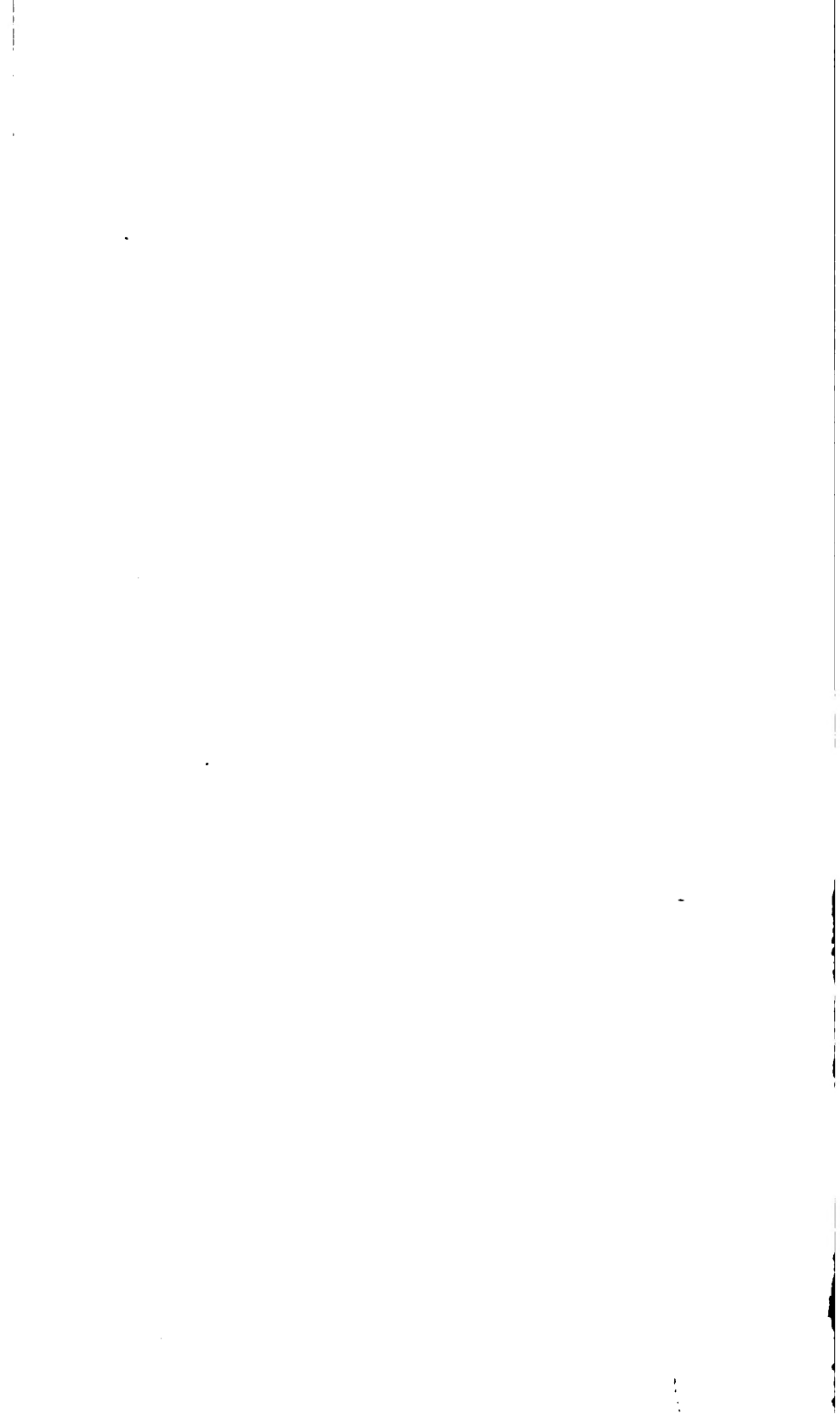
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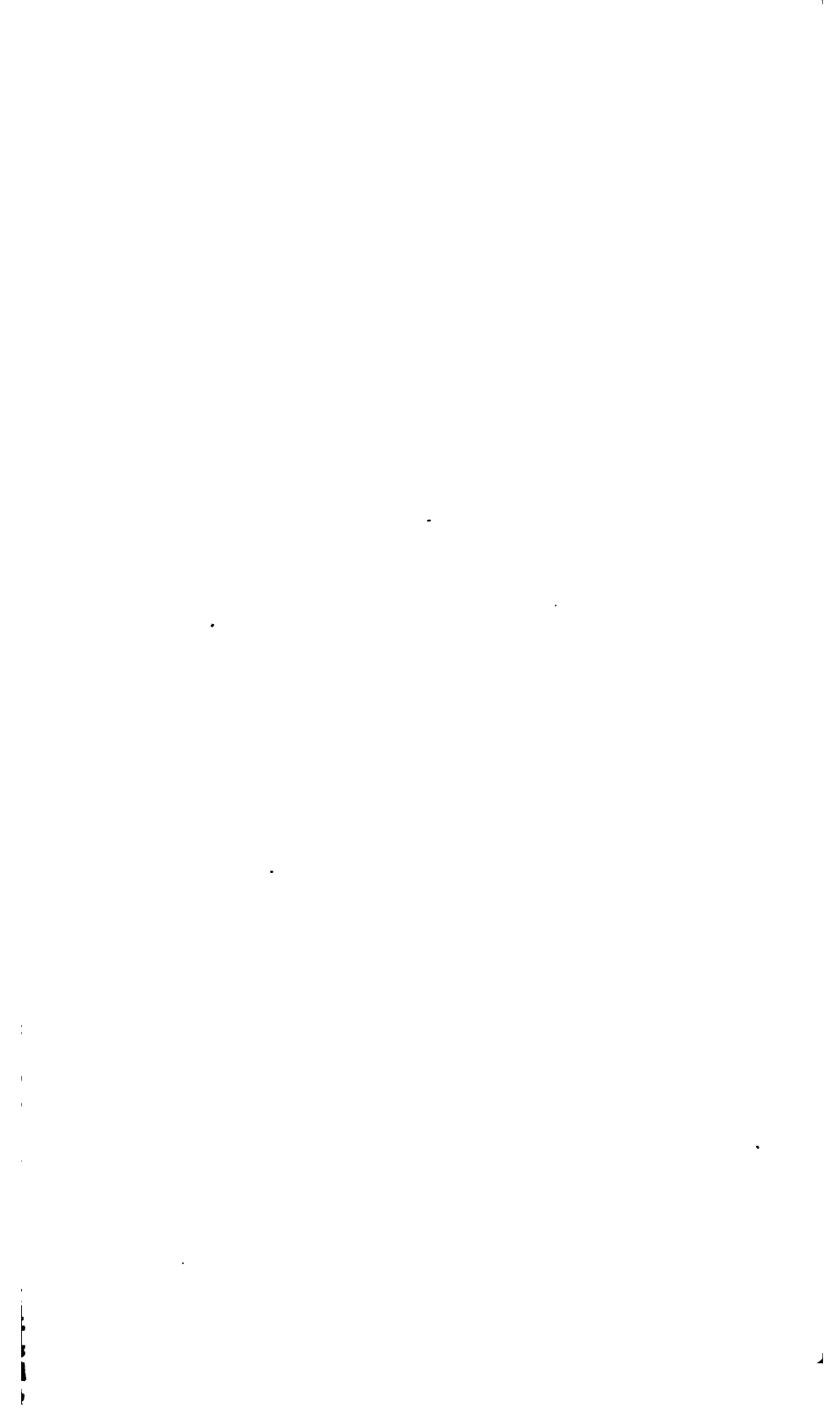
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXXXVI.

CONTAINING

CASES IN THE COMMON PLEAS AND IN THE EXCHEQUER CHAMBER IN
EASTER AND TRINITY TERMS, AND TRINITY VACATION, 1856.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
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ERRATA IN 13 C. B. (E. C. L. R. vol. 76).

Page 762, line 4, for "give," read "save."

— 763, line 9, for "since," read "before."^(a)

(a) See the judgment of Vice-Chancellor Page Wood, in *Arnold v. The Mayor, &c., of Gravesend*, 2 Kay & Johnson, 589.

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OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir JOHN JERVIS, Knt., Lord Chief Justice.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.

The Hon. Sir RICHARD BUDDEN CROWDER, Knt.

The Hon. Sir JAMES SHAW WILLES, Knt.

ATTORNEY-GENERAL

Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITOR-GENERAL

Sir RICHARD BETHELL, Knt.



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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Easter Term,
IN THE
NINETEENTH YEAR OF THE REIGN OF VICTORIA. 1856.

THE Judges who usually sat in Banco in this Term were:—

JERVIS, C. J.
CRESSWELL, J.

CROWDER, J.
WILLES, J.

MEMORANDA.

IN the Vacation preceding this Term, Gillery Pigott, Esq., George Hayes, Esq., and Mordaunt Lawson Wells, Esq., all of the Middle Temple, were called to the degree of the coif.

They gave rings with the following motto,—“Cedant arma togæ.”

On the first day of this Term, Charles Jasper Selwyn, Esq., of Lincoln's Inn, and Hugh M'Calmont Cairns, Esq., of the Middle Temple, who had been appointed Her Majesty's Counsel learned in the law, took their seats within the Bar.

***2] *PASHBY and Another v. THE MAYOR, ALDERMEN, AND
BURGESSES OF THE BOROUGH OF BIRMINGHAM.**

April 25.

By a contract for the building of a borough gaol, it was provided, amongst other things,—“that no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained; and that no allowance for alterations should be made, unless the value of the same was ascertained at the time the work was done, and entered in a book, such entry to be submitted to and approved of by the architect,”—“that no payments should be made to the contractors, except on the production of a certificate from the architect that a certain amount of work had been done; and that the architect should deliver his certificate thereof at the end of every fourteen days,”—and “that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given his certificate; the amount of such certificate to be less by certain varying proportions than the value of the work done, until 90 per cent. of the whole should be completed; and that no further payments should be made to the contractors until within three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one-half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect’s certificate of completion :”—

Held, that the architect’s certificate of final completion was sufficient, without mentioning the amount remaining due.

By the contract it was further provided, that, if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference, or question should be settled by the architect, whose decision thereon should be absolute and final :—
Held that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and the corporation as to their claim for extras.

THIS was an action brought by the plaintiffs, who were builders, against the defendants, to recover a balance of 4461*l.* 19*s.* 8*d.* claimed to be due from the defendants to the plaintiffs in respect of the building of the gaol at Birmingham.

The cause came on to be tried at the Warwick Spring Assizes in 1855, when the cause and all other matters in difference between the parties were referred to arbitration, with power for the arbitrator to state a special case, including all matters of law that might be raised before him, as well as those already raised by demurrer; such special case to be stated and disposed of before the arbitrator entered upon any question of amount. In pursuance of this power, the arbitrator stated for the decision of the court the following case :—

The declaration in this cause contains a count on the special contract hereinafter mentioned, and also a count for work and materials.

***3] *The following are the particulars of the plaintiffs’ demand :—**

	£	s.	d.
“1847. To general work done by the plaintiffs for the defendants at the borough gaol	9209	18	1
To skylights	6	0	0
To pump well	28	17	9
To iron bars	146	2	5
To model	8	10	0
To whitewashing	296	0	0

	£	s.	d.
To shelving - - - - -	153	10	0
To bridge enclosing same - - - - -	15	12	0
To main ventilation flues - - - - -	2083	17	2
To day-work - - - - -	1077	6	8
To fittings - - - - -	140	11	10
To amount of work done under the contract mentioned and set forth in the declaration in this cause - - - - -	83,469	11	5"

The plaintiffs claimed a balance of 4461*l.* 19*s.* 8*d.*

To the declaration there were various pleas and subsequent pleadings, raising several questions of law and fact; and, for the purpose of guiding the arbitrator in the determination of these issues, and of other questions raised before him upon the reference, he stated the following facts for the opinion of the court:—

On the 27th of October, 1846, a contract was entered into between the plaintiffs and defendants, of which the following is a copy:—

"This indenture, made the 27th day of October, 1846, between Thomas Pashby and Charles Henry Plevins, both of the borough of Birmingham, in the county of Warwick, builders and copartners, of the one part, and The Mayor, Aldermen, and Burgesses of the said borough, of the other part: Whereas, public notice having been given that persons desirous of contracting to complete the work of the Birmingham Borough Gaol, *and to supply the necessary materials and labour [*4 for that purpose, were to send sealed tenders to the town-clerk of the said borough at the time and in manner in the said notice mentioned; and notice was also given that plans, drawings, and specifications of the works to be performed, were prepared, and might be inspected at the office of D. R. Hill, of the said borough, architect, where copies of the conditions might be obtained on which the tenders for the completion of the works would be accepted, by persons desirous of undertaking the same: And whereas the said Thomas Pashby and Charles Henry Plevins, by a tender under their hands, dated the 17th of October, 1846, offered to perform the whole of the several works required in the completion of the said gaol according to the said condition, specifications, and drawings, for the sum of 83,469*l.* 11*s.* 5*d.*: And whereas the said conditions, and the said tender under the hands of the said Thomas Pashby and Charles Henry Plevins, and the schedule of prices, drawings, and specifications in such conditions and tender referred to, are annexed by way of schedules to these presents: Now this indenture witnesseth, that they, the said Thomas Pashby and Charles Henry Plevins, do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them doth hereby severally, for himself, his heirs, executors, and administrators, covenant and agree with the said Mayor, Aldermen, and Burgesses, their successors and assigns, that they, the said Thomas Pashby and Charles Henry Plevins, their exe-

cutors and administrators, shall and will well and effectually do, execute, and perform all the works, acts, matters, and things whatsoever by the said tender under the hands of the said Thomas Pashby and Charles Henry Plevins annexed by way of schedule to these presents offered, proposed, or agreed to be done, according to the true intent of the said *5] tender, and the *conditions, specifications, and drawings therein referred to, and also annexed by way of schedule to these presents: And the said Mayor, Aldermen, and Burgesses, do hereby covenant and agree with the said Thomas Pashby and Charles Henry Plevins, their executors and administrators, that they, the said Thomas Pashby and Charles Henry Plevins, their executors or administrators, well and truly performing, fulfilling, and keeping the covenants and agreements on their and his parts hereinbefore contained, they the said Mayor, Aldermen, and Burgesses, or their successors, shall and will pay unto the said Thomas Pashby and Charles Henry Plevins, their executors and administrators, the several amounts and sums of money which the said Thomas Pashby and Charles Henry Plevins, their executors or administrators, shall from time to time be entitled to receive according to the terms of the said conditions in this behalf, at the respective times, and according to the true intent and meaning of the same conditions. In witness, &c."

The following is a copy of the conditions referred to in the said contract:—

"Borough of Birmingham.

"Conditions to be observed by persons contracting with the Mayor, Aldermen, and Burgesses of the borough of Birmingham, in the county of Warwick, for the completion of the new gaol in the said borough, on a piece of ground situate at Winsor Green, in the said borough, according to the drawings and specifications prepared by Mr. D. R. Hill, architect, and which said drawings and specifications are numbered from 1 to 24 A., both inclusive.

"Immediately on possession being given up to the contractor or contractors, all temporary fencing, gates, and other provisions required for *6] enclosing and *protecting the site and the properties adjoining, and for the prevention of trespass or injury, and for the proper drainage of the land while the works are in progress, are to be made by the contractor or contractors, who shall also indemnify and hold harmless the said Mayor, Aldermen, and Burgesses of the said borough of Birmingham against any damage caused by the want of such necessary conveniences and precautions.

"The contractor or contractors will also be required to make and maintain all roads or ways that may be necessary for the conveyance or landing of materials to the site, and keep in repair such roads, towing-paths, or ways, as are already made, and shall also keep in proper repair, to the satisfaction of the architect, all offices, erections, and buildings

upon the premises, and provide any fittings or other things that may be required in the office of the clerk of the works.

"The contractor or contractors will be required, having reference to the present state of the works, to complete the whole according to the drawings and specifications, and take to and allow for in his or their tender the whole of the plant and other materials, excepting the stock of bricks, upon the ground, for which he or they will be required to pay 83s. per thousand.

"The contractor or contractors will have the advantage of working the brickyard lately in the occupation of Mr. Walthew; and he or they will be required, in order that the external part of the buildings may correspond with the works already performed, to work the said brickyard, and to take to the same, and the plant and other things appertaining thereto and used therewith, at the cost price; and shall give satisfactory security for the due payment of the royalties and performance of the agreement under which the said brick yard is now held. The contractor or contractors will also be required *to take particular [*7 care that the bricks are of the same size and colour, and none others will, under any circumstances, be permitted to be used.

"The estimate must include all and every expense necessary for the completion of the buildings according to and as described in the specifications and descriptions, and as shown in the drawings. The works to be commenced immediately upon possession being given to the contractor, and completed in every respect on or before the 29th of September, 1848. And the said contractor or contractors shall be liable to pay and shall pay to the said Mayor, Aldermen, and Burgesses of the said borough of Birmingham, for each and every week succeeding the date hereby fixed upon for the completion of the works, the sum of 50*l.*, and a rateable proportion of 50*l.* for any part of a week, such sum or sums of money to be and be taken to be liquidated damages owing from the said contractor or contractors to the said Mayor, Aldermen, and Burgesses of the said borough of Birmingham; without prejudice, however, to the power hereafter provided for determining the contract and re-letting the works.

"From the commencement to the finishing of every part of the works hereby contracted for, the same and all materials and things upon the premises from time to time during the progress of the works, shall be deemed to be the property of the Mayor, Aldermen, and Burgesses; but the care of the same, and everything connected with or appertaining thereto, shall be with the contractor or contractors; who shall each in in his or their respective departments protect and preserve entire and uninjured the whole of the works belonging to his or their respective contracts: and, if any injury or disfigurement shall be done thereto by the inclemency of the weather, or by accident of any description, or by

*8] the artificers employed, *or by any other means, evitable or inevitable, then and in every such case the contractor or contractors shall completely repair or replace the same, as the case may be, at his or their own cost; so that, at the conclusion of the works, every part of the building may be complete and perfect, and in a clean state; and neither the architect nor the Mayor, Aldermen, and Burgesses shall be held responsible, nor shall be chargeable, for anything lost, stolen, destroyed, damaged, or removed, or that shall fail in any way.

"The contractor or contractors shall also insure the building and materials from fire, at such times and in such amounts as may be directed by the architect.

"The contractor or contractors shall provide all labour, freightage, materials, and workmanship, and proper sheds for workmen, and shall also provide all requisite ladders, planks, vessels, ropes, capstans, wheelbarrows, chains, grinding-mills, pumps, machinery, carriages, and water, also all pulleys, blocks, centres, turning-pieces, all rods, rules, lines, levels, and tools of every description required, and every other matter and thing necessary for the proper carrying on and completion of the several works stipulated and contracted for: the contractor or contractors shall also completely protect and preserve the works as shall be directed by the architect, with casings or guards, or in such other way as may be by him thought advisable.

"The drawings and specifications shall be taken together to explain each other according to their true intent and meaning; and, should anything have been omitted either in the specifications or drawings which shall be necessary for the proper completion of any part or parts of the several works, the contractor or contractors shall provide materials and labour for the same at his or their own expense and cost, just as if they *9] had *been more particularly described or shown, and shall supply whatever may be required to complete the whole in a workmanlike manner.

"No alterations, additions, or omissions shall be made without written authority signed by the architect; and such alterations, additions, or omissions so ordered, shall not invalidate the contract or contracts, but the value of the said alterations, additions, or omissions shall be ascertained by the architect, and added to or deducted from the amount of the contract or contracts, as the case may be: and no allowance for alterations, additions, or omissions, shall be made to either or any party, unless the value of the same is ascertained at the time the work is done, and entered in a book kept for that purpose; such entry to be submitted to and approved of by the architect.

"The contractor or contractors will be required to affix prices to a blank schedule (which will be furnished) of the principal items of the work, and deliver the same with their tenders; such prices to include the use of all scaffolding, ladders, cartage, &c., tackle, and carriage to

the places required, and every other matter and thing necessary, without any additional charge whatever; and shall also find two or more responsible persons as sureties to be bound jointly and severally, in an amount equal to 10 per cent. of the amount of the tender, for the due fulfilment of the contract or contracts according to the several conditions, specifications, drawings, and particulars, and according to such working-drawings and directions as shall be given during the progress of the works. If the contractor or contractors shall fail in the fulfilment of any of these conditions, the architect, with the consent of the said Mayor, Aldermen, and Burgesses, shall have full power to terminate the contract or contracts, and enter into any new contract for the completion of the works, without prejudice to any of *the remedies [*10 against the contractor or contractors, or his or their sureties, upon the contract and bond to be executed by him or them respectively.

“The works shall be performed by proper workmen, and carried on in a regular and progressive manner to the satisfaction of the architect; and no part of the works shall be underlet by the contractor or contractors to any party or parties whomsoever without the previous consent in writing from the architect: and under no circumstances shall any portion of the work be let at task or piece-work.

“The contractor or contractors to provide all requisite scaffolding, erected in the most approved manner, so that the works can at all times be completely examined by the architect or clerk of the works.

“The architect shall have power to order the removal of any part or parts of the works which may appear to him to be of an improper description; and the contractor or contractors shall also remove from the ground all materials which in the opinion of the architect are not of proper quality, or unfit for the works, as soon as objected to; and, in case of refusal by the contractor or contractors to conform to such directions, the architect shall have full power to employ other tradesmen or workmen to perform the work, and to provide or remove materials, and to deduct the cost or costs of the same from any sum due or to become due to the contractor or contractors, without prejudice to any of the remedies against him or them, or his or their sureties, for breach of contract, or otherwise.

“No materials, scaffolding, or other things, will be allowed to be removed from the ground, unless an order in writing to that effect be given by the architect.

“The architect shall have full power to dismiss from the works any workman or workmen who shall misconduct himself or themselves, or who in the architect's *opinion are incompetent; and each workman must conform to the regulations expressed on the notice board [*11 which will be affixed on the premises.

“The contractor or contractors shall keep a foreman in each department of work, to whom directions may be given by the architect or clerk

of the works, and which foreman shall superintend the workmen in his respective department.

"The contractor or contractors, or his or their foreman, shall attend when so required, either at the office of the architect or at the site of the building, to receive directions.

"The contractor or contractors shall undertake to pay the workmen employed by him or them at the works, and not elsewhere.

"The contractor or contractors to act under the direction of the clerk of the works during the absence of the architect. The duty of the clerk of the works will be, to see that the plans and all particulars are carried into execution (the works being set out by the contractor or contractors); and he is not to be employed in any way whatever by the contractor or contractors: and, in case the contractor or contractors, or any person or persons on his or their behalf, give any gratuity or reward to any clerk of the works or other person employed about the works, the same not being in the employ of the contractor or contractors, then the architect, with the consent of the said Mayor, Aldermen, and Burgesses, shall have full power to cancel the contract; and thereupon the bond of the contractor or contractors shall be forfeited, and may be enforced against him and his sureties.

"The contractor or contractors shall, when called upon to do so, suspend any part or parts of the works during such period as the architect shall determine; and shall thatch or otherwise secure the work from the *12] *effects of frost or weather, in such ways as the architect shall direct."

"In case the architect or the clerk of the works shall have given notice to any contractor or contractors that any part of the works must be inspected, previous to the same being covered or hidden, the contractor or contractors shall give proper notice to the architect before any such work is covered or hidden: and, in case any work is so covered or hidden without written authority from the architect, the contractor or contractors shall uncover the same at his or their own expense; and, in case of refusal, the architect shall have power to employ men to do so, and shall deduct any cost or charge for the same from any sum due or that may become due to the contractor or contractors.

"The contractor or contractors shall provide proper day and night watchmen, and a door-keeper, whose wages shall be paid by the respective contractors in proportion to the relative value of the works so protected: and, in case the contractors shall not agree as to the said proportions, the architect shall determine the same, and his decision shall be final and conclusive between the said contractors.

"If any dispute or difference of opinion should arise with the contractor or contractors in any way relating to the contract and these conditions, connected with or relating to the proposed buildings and works, or if any question should arise between any of the several con-

tractors relating to the proposed buildings and works, such dispute, difference, or question shall be settled by the architect, whose decision thereon shall be absolute and final.

"If it shall appear to the architect that the works have been delayed, so that they cannot be completed within the time stipulated by the conditions and contract, or, should the work not be proceeded with to the *entire satisfaction of the architect, he shall have full power and [*13 authority, after giving seven days' notice in writing, delivered to the contractor or contractors, or left at his or their usual place or places of abode, to employ other workmen, and to use any materials belonging to such contractor or contractors which shall be upon the ground, and to purchase other materials; and the cost of employing such workmen, and of providing and using the materials, and of such other materials to be purchased, shall be deducted from any sum or sums of money that may be due or that may become due to the contractor or contractors, without prejudice nevertheless to any of the remedies against him or them, or his or their sureties, upon the contract and bond to be executed by him and them respectively: and the architect, with the consent of the Mayor, Aldermen, and Burgesses, or the said Mayor, Aldermen, and Burgesses, shall have full power and authority, if they shall think proper, to enter into any contract or contracts with any person or persons for the completion of any of the works, without prejudice to any of the remedies against the contractor or contractors for breach of contract.

"During the progress of the works, or at the completion thereof, the contractor or contractors will be required to remove from the site all soil, rubbish, and other matters not required for levelling or other purposes, or as may be from time to time directed by the architect.

"Should any of the drawings or specifications, or any other papers, be lost, essentially injured, or destroyed, by the default of the contractor or contractors, or their sureties, the contractor or contractors, or their sureties, shall pay the costs of furnishing duplicates.

"No payments to be made to the contractor or contractors, except on the production of a certificate from the architect that a certain amount of work has been done or materials delivered: and the architect shall *deliver his certificate of work done or materials delivered at the [*14 end of every fourteen days.

"The contractor or contractors shall be entitled to receive at the end of every fourteen days the amount for which the architect shall have given his certificate. The amount of such certificate to be 25 per cent. less than the value of work performed or materials delivered, until the architect has certified that an amount equal to 85 per cent. of the whole of the contract to be entered into by the contractor or contractors has been completed to his satisfaction; from that period, a deduction from the value of work performed shall be made at the rate of only 15 per cent. until 70 per cent. of the whole contract as aforesaid has been com-

pleted; and the deduction be from thence 10 per cent. until 90 per cent. of the same be completed: and no further payment to be made to the contractor or contractors until three calendar months after the architect shall have certified the completion of the whole work to his satisfaction, when one-half of the remainder shall be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion.

"The contractor or contractors will be required to keep the whole of the buildings, walling, drains, cisterns, and other works, in repair for twelve months after the architect has certified the completion of the works.

"The tenders to be drawn up according to the accompanying form, the spaces left for that purpose being filled up with the requisite particulars, and the signatures of the party or parties attached thereto, with their names and addresses written in full.

"None of the parties making tenders not accepted, for all or any part of the works, shall have any claim of any kind whatever, whether their tenders may be lower or not than the tender accepted.

*15] "The party or parties whose tender shall be accepted, *shall, within fifteen days after due notice is given, find sureties, to be approved of by the Mayor, Aldermen, and Burgesses, and which sureties shall become bound with the contractor or contractors jointly and severally in an amount equal to 10 per cent. of the amount of the tender, for the due and proper fulfilment of the contract or contracts, and all the conditions and stipulations contained in these conditions:—

"The parties tendering must state in their tenders the cost of performing the separate works in the various trades, as under.

"Excavator, bricklayer, and mason.

"Carpenter and joiner.

"Iron-founder.

"Slater.

"Plasterer.

"Plumber, glazier, and painter."

The tender, specifications, and drawings referred to in the said contract, and annexed, with the said conditions, by way of schedule thereto, were not considered by the arbitrator to be material with respect to the questions intended to be raised in the case; but the same were to be referred to by the parties as a part of the case, if they should be deemed material by either of them.

After the making of the contract, the plaintiffs proceeded to perform the work contracted for. Mr. D. R. Hill, the architect mentioned in the contract and conditions, continued to be the architect employed by the corporation in superintending the erection of the gaol, and acted as such throughout the whole work.

Prior to the making of the contract, the defendants had appointed,

pursuant to the provisions of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 70, a committee, called at first "The Gaol Committee," and afterwards "The Gaol and Corporate Buildings *Committee," whose duty it was to superintend the erection of the gaol and the [16 performance of the plaintiffs' contract, and which committee was renewed and reappointed annually up to and inclusive of the year 1851. This committee was accustomed to sit at frequent intervals during the progress of the works, and to receive and consider the reports of the architect and the communications of the contractors and others relative thereto, and to determine what should be done upon such reports and communications, and also to sanction payments to the contractors, and otherwise to act in reference to the superintendence of the works, and to report their proceedings from time to time to the town council for their approval; and it was the duty of the architect to make periodical reports to this committee during the progress of the work.

During the progress of the buildings, a considerable amount of extra work was performed, and some deductions and omissions were made, in respect of the specified work. The work was not completed by the time specified in the contract; but no question arose upon that point in the present case. Shortly before that time, an extension of the period for the completion was applied for and obtained; and afterwards the work was completed, and the certificates of the architect hereinbefore mentioned were given.

Payments on account were made by the defendants during the progress of the work, on the certificates of the architect. The course adopted, was, for the plaintiffs to make out and deliver statements to the architect, who then granted certificates of the amounts which they were entitled to receive, directed to the treasurer of the borough, who thereupon paid the amounts certified.

The total amount claimed by the plaintiffs to have been due on account of all the works performed by them, was, 46,435*l.* 17*s.* 5*d.*

*The amount paid to the plaintiffs was 41,973*l.* 17*s.* 9*d.*, leaving a balance sought to be recovered by the plaintiffs, of 4461*l.* [17 19*s.* 8*d.*

It was contended before the arbitrator, on behalf of the defendants, that irrespective of every other question, the plaintiffs were wholly precluded by the terms of the contract from recovering anything in the action against the defendants, on the following grounds, viz.—first, because the architect had not given any such certificate as required by the conditions, and the defendants had paid all sums of money for which the architect had certified,—secondly, because, under the clause relative to disputes and differences contained in the conditions, the architect had made a decision (which was final and binding on the plaintiffs), finding that a certain balance was due to the plaintiffs, which the defendants had, pursuant to such finding, duly paid to the plaintiffs.

As a decision upon either of these two points in favour of the defendants would probably render any investigation of the amount claimed by the plaintiffs wholly unnecessary, the arbitrator, at the request of the parties, and in pursuance of the provisions contained in this behalf in the order of reference, stated this case with the view of obtaining the opinion of the court upon the questions so raised. The following were the facts proved before him with respect to each of those questions.

First, as to the certificate of the architect.

It was admitted by the plaintiffs, that the architect had not given any certificate that the balance claimed, or any part of it, was due to the plaintiffs: but it was contended by them, that no certificate of the amount claimed as a final balance was required by the terms of the contract and conditions. According to their construction of the conditions, certificates of particular amounts being payable were only necessary in *18] respect of payments on account until 90 per cent. had been paid; and that, after payments made up to that amount (which had been the case long before the action), the only certificate which was required to entitle them to the final balance remaining due, was, a certificate of the completion of the work to the satisfaction of the architect, which, it was contended, had been given long before the commencement of the action.

The facts relating to such certificate were as follows:—

On the 27th of February, 1849, the whole of the work had been completed, with the exception of certain works of comparatively small amount, the performance of which the architect considered it expedient to postpone. At this time, payments had been made on account under the certificates of the architect above referred to, amounting to or exceeding 90 per cent. of the whole work; and the plaintiffs applied to the architect for a certificate of the completion of the contract. In pursuance of such request, the architect directed to the gaol committee a certificate in the following terms, viz.

“Borough Gaol.

“Gentlemen,—Having been applied to by the contractors, Messrs. Pashby & Plevins, to certify the completion of their contract, I do hereby certify that the work comprised in the said contract has been completed to my satisfaction, with the exception of certain work the completion of which I have directed to be postponed; subject to the completion of the remaining work at such time and in such manner as I may direct. Witness my hand, &c.”

On the 28th of February, 1849, the plaintiffs transmitted the architect's certificate to the committee, with an application for payment of the balance remaining due on the contract. The certificate and report *19] of the architect and the plaintiffs' application were entered on the minutes of the committee, and afterwards reported to the council, and approved and confirmed.

The works the performance of which had been delayed by the architect were afterwards performed by the plaintiffs according to his directions, and also certain work ordered after his certificate; and, on the 25th of September, 1849, he sent to the committee a report in writing, and signed by him, stating, amongst other things, as follows,—“I beg to inform you that the gaol may now be considered as complete, very few matters still requiring to be done: among the principal of those may be named the oven; and this has been delayed in consequence of the bakehouse having been used as a smith's shop; and the hearth and bellows, anvil, &c., could not be removed without causing inconvenience. A few of the fastenings to the gates will require fixing; the chevaux-de-frise upon the boundary wall, where the division walls of yards intersect it, and some other matters which require your decision, a list of which I shall lay before you; the repairs consequent upon the injury done to the buildings during the period the gaol was thrown open for public inspection, of which I have prepared a list, require attention; but a very short time will suffice to do this work.”

The matters specified in the architect's report as still required to be done, were not to be done by the plaintiffs as part of their contract. These matters were afterwards finished; and, on the 28th of June, 1850, the architect made and transmitted to the committee a report or certificate, which was laid before the committee, and entered on the minutes on the 8th of July, 1850, and which was in the following terms:—

“I have the honour of reporting for your information, that the works at the new gaol, contracted for by Messrs. Pashby & Plevins, are now finished, and I find that the sum of 59*l.* 7*s.* 2½*d.* is due to them [*20 as the balance of their contract.

“In accordance with the instructions of your committee, I have examined the account rendered to you by the contractors for extra works; and, after making a careful estimate of the extra works, and also of works omitted, I certify that the contractors are entitled to the sum of 392*l.* 16*s.* 4½*d.* as the balance for extra works.”

The plaintiffs contended before me that the certificate of the 27th of February, 1849, was a certificate of completion within the meaning of the contract; or, if not, that the report of the 25th of September, 1849, was a certificate of completion; or that, at any rate, the report or certificate of the 28th of June, 1850, was a conclusive certificate of the entire completion of the work.

The balances mentioned in the last report or certificate had been paid before action by the defendants to the plaintiffs, who had received the same under protest; and no certificate had been given by the architect that any further sum was due to the plaintiffs.

Upon this part of the case, the question was, whether, under the terms of the contract and conditions with regard to certificates, the plaintiffs were precluded from recovering the balance claimed by them.

Secondly,—as to the decision of the architect under the clause in the conditions and the contract providing for a difference or dispute, the facts were as follows:—

After the work had been completed, and before any account had been sent to defendants, or made out by the plaintiffs, the plaintiffs spoke to the architect about having the extra work ascertained and measured. The plaintiffs appointed one Thorpe to measure on their part, and the architect appointed one Ford to meet Thorpe, and measure on behalf *21] of the defendants. The *two parties met, and proceeded with the measurement of the work for a considerable time. In the course of the measurement Ford from time to time referred to the architect for instructions; but, before the measurement was completed, questions arose between the plaintiffs' valuer and Ford respecting the mode in which certain parts of the work should be measured; and, ultimately, about the 5th of July, 1849, Ford refused to proceed further with the measurement.

At this time, about five-sixths of the work had been measured and agreed on. The plaintiffs wrote several letters to the architect, requesting to know when the measurement was to be proceeded with, but the architect verbally and by letter declined proceeding with it; and, after some other communications, wrote to the plaintiffs a letter on the 18th of July, 1849, of which the following is a copy:—

“Gentlemen,—In answer to your letter of this day's date, as well as some previous letters requesting me ‘to resume the measurements,’ I have to remind you that you already know my opinion thereon; and, as you appear not to acquiesce in my views, you will therefore have the goodness to make out your accounts as soon as the completion of the works will allow you to do so, and forward them to me for my examination, when they shall have my immediate attention.”

During the time when the measurement of the works was being proceeded with, and also after Ford had refused to proceed further, the plaintiffs were employed in executing various additional works to the gaol, and received from time to time from the architect certificates for payment on account. On the 22d of September, 1849, the plaintiffs wrote to the architect the following letter:—

“Birmingham, September 22d, 1849.

*22] “Sir,—Some months have now elapsed since any *progress was made in measuring off the works executed in addition to the contract, and since your surveyor has discontinued going on with the measurements. We now consider it right, in justice to ourselves, and with the wish to have these accounts closed as early as possible, to proceed with the completion of these measurements. We shall, therefore, attend at the gaol on Tuesday morning next, at 10 o'clock, for the purpose of resuming the measurements, and shall commence at the point your surveyor, Mr. Ford, left off on the 5th of July last, to take the account of

works not included in the particulars taken by him, and which are extra to the contract.

"We shall be glad if you can meet us at the gaol on that day; but, if that time will not be convenient to you, we shall be glad to alter the arrangement to suit your views."

The architect did not meet the plaintiffs, or appoint or authorize Ford or any other person to proceed with the measurements; and the plaintiffs' agent, Thorpe, then proceeded to complete the measurement; and the plaintiffs thereupon made out their account in detail of the whole of the works performed by them. The aggregate of such accounts, after deducting omissions from the contract, and additional extras, was 46,435*l.* 17*s.* 5*d.*; and the plaintiffs gave credits for payments then made, amounting to 34,690*l.* 14*s.* 2½*d.*, and claimed a balance of 11,745*l.* 3*s.* 2½*d.* as being then due, on account of which the defendants afterwards paid to the plaintiffs a further sum of 3300*l.*, and then leaving a balance of 8445*l.* 3*s.* 2½*d.*

These accounts the plaintiffs sent to "The Gaol and Corporate Buildings Committee," with a letter addressed to the chairman of such committee, of which the following is a copy:—

"Dear Sir,—We herewith hand you our accounts for work executed at the borough gaol, Birmingham, showing a balance due to us of 11,745*l.* 3*s.* 2½*d.* We shall *feel greatly obliged by an early settlement of these accounts; and, as it is possible that some short [*28 time may elapse before they can be finally closed, we trust the committee will at its next meeting order payment to be made to us, on account, of 5000*l.* or 6000*l.*

"We need scarcely remark that the heavy balance due is a source of considerable inconvenience and loss to us; which, together with the loss we have sustained on the contract, will we hope induce the committee to direct an early settlement."

On the 31st of December, 1849, the committee passed a resolution that the plaintiffs' account should be referred for examination to the architect; and, on the 2d of January, 1850, the town clerk wrote to the plaintiffs the following letter, in acknowledgment of their accounts and letter:—

"Town Clerk's Office, 20 Temple Street,
"January 2d, 1850.

"Gentlemen,—I am directed by The Gaol and Buildings Committee to acknowledge the receipt of your letter and statement of account, and to inform you that the same have been referred to the architect for examination."

The accounts were laid before the architect by the defendants for examination pursuant to this letter, and remained before him for some time; during which the plaintiffs applied for and received a payment of

3300*l.* on account of the balance remaining unpaid on the contract, and made several applications for further payments.

The plaintiffs, understanding that the accounts were before the architect, called on him two or three times on the subject, and asked him if he had any questions to ask respecting the accounts. The architect informed them that he had no question to ask, and asked if the plaintiffs had any question to ask of him. In the month of March, they made *24] application both to the architect *and the corporation committee for a further payment on account; and, on the 26th of March, 1850, the town clerk wrote to the plaintiffs the following letter, with the copy of the resolution which follows it:—

“Town Clerk’s Office.

“Gentlemen,—On the next side I beg to transmit you copy resolution of The Gaol and Buildings Committee.”

The resolution annexed was as follows:—

“Gaol and Buildings Committee, March 26th, 1850.

“A Letter from Messrs. Pashby & Plevins read.

“Resolved,—That the letter be received.

“Resolved,—That Messrs. Pashby & Plevins be informed that the committee has given directions to Mr. Hill to proceed with the examination of their account as speedily as possible.”

On the 29th of June, 1850, the plaintiffs addressed the following letter to the chairman of The Gaol and Corporate Buildings Committee.

“Sir,—Our object in calling upon you this morning was, to speak with you in reference to the balance due to us for works executed at the borough gaol, to ask you to have the kindness to fix an early day in the ensuing week for the next meeting of the Gaol and Buildings Committee, at which meeting we are informed your architect will be prepared to lay his report on our account before you. It is now six months since our accounts were forwarded to your committee, during which time we have received no advance on account of the heavy balance due to us. We have waited patiently thus long, on the assurance of the committee that they had given their architect instructions to examine the accounts forthwith, and with the understanding that no time would be lost in the matter. We presume you are aware that the balance due to us is between *25] 8000*l.* and 9000*l.*; and we feel convinced *that it must be a source of regret to yourself individually, and the other members of the committee, that we have suffered the loss and inconvenience necessarily arising from so large a sum remaining in your hands. You are perhaps aware, that, independently of this, the matter has been a very unprofitable one to us, and must consequently conclude that the inconvenience and loss resulting from the delay is daily increasing. We, therefore, hope that you will have the kindness to use your influence in bringing the matter to a close.”

On the 8th of July, 1850, the town clerk addressed to the plaintiffs

the following letter, accompanied by the copy resolution which follows it:—

“Town Clerk’s Office.

“Gentlemen,—On the next side you have copy resolutions passed by the Gaol Committee this morning, which I am directed to transmit to you.”

The resolution was as follows:—

“Gaol and Buildings Committee, 8th July, 1850.

“Resolved,—That the town clerk be instructed to inform Messrs. Pashby & Plevins that the architect has certified to this committee that the sum of 59*l.* 7*s.* 2½*d.* is due to them as the balance of their contract: and that he has also certified that they are entitled to the sum of 392*l.* 16*s.* 4½*d.* as the balance for extra works.

“Resolved,—That the copy of the above resolutions be transmitted to Messrs. Pashby & Plevins.”

Before this letter was written, and before the resolution of the committee had been made and passed, the architect had made and sent to the committee the report or certificate of the 28th of June, 1850, and which appeared to have been received by the committee, and entered on their minutes, on the 8th of July, 1850. [See this document, ante p. 16.]

The plaintiffs were not aware of this report until after it was made; and they were first informed of it by a letter from the town clerk, of the 8th day of July, 1850.

*The architect signed the following instruments:—

[*26

“Borough Gaol, Birmingham, 28th of June, 1850.

“To the Treasurer of the Borough.

“I hereby certify that work has been done, and materials delivered, as per statement at foot, on account of which Messrs. Pashby & Plevins are entitled to receive the sum of 59*l.* 7*s.* 2½*d.*, the same being the balance due to them on their contract.

“D. R. HILL,

“Architect.

“Work done and materials delivered 59*l.* 7*s.* 2½*d.*

“Gaol Committee, 1st of January, 1851.

“Approved, by order of the committee.

“WM. LUCAS, Chairman.”

“Birmingham, 28th June, 1850.

“To the Treasurer of the Borough.

“I hereby certify that work has been done and materials delivered as per statement at foot, on account of which Messrs. Pashby & Plevins are entitled to receive the sum of 392*l.* 16*s.* 4½*d.*, the same being the balance due to them for extra works.

“D. R. HILL,

“Architect.

“Work done and materials delivered 392*l.* 16*s.* 4½*d.*

“Gaol Committee, 1st of January, 1851.

“Approved, by order of the committee.

“WM. LUCAS, Chairman.”

These two instruments were not made upon any application of the plaintiffs, or with their knowledge. They were not laid before the gaol committee until the 1st of January, 1851, and were not communicated to the plaintiffs until some time afterwards. At the time when the accounts were referred to the architect for examination pursuant to the letter of the town clerk of the 2d of January, 1850, no dispute had
 *27] arisen between the *plaintiffs and defendants, or the committee, as to the balance due; nor had the plaintiffs had any communication with the architect on the subject of the balance due. The plaintiffs were not asked to agree, nor did they in fact agree, to refer the question of the amount of the final balance to the arbitration or decision of the architect, unless the court shall be of opinion that such agreement is contained in the contract and conditions. The architect never appointed any meeting for the examination of the accounts, or called the plaintiffs before him, or gave the plaintiffs any intimation that he wished them to attend before him on the subject; and, as already stated, when the plaintiffs called upon him relative to the accounts, when they were before him, he informed them that he had no questions to ask respecting the accounts, and neither gave to them nor received from them any information relative thereto; but, so far as the plaintiffs were concerned, made his examination of the accounts altogether in private, and without receiving any evidence, information, or statements from them on the subject.

After the plaintiffs had received information of the result of the architect's examination of the accounts, they repeatedly applied to him for particulars of the objections to the plaintiffs' accounts; but he declined to furnish them with any information on the subject.

The plaintiffs afterwards received from the corporation under protest the payment of the two sums mentioned in the architect's report.

The questions for the consideration and determination of the court were,—

First, whether, under the terms of the contract and conditions with respect to certificates, the plaintiffs were precluded from recovering any balances claimed by them.

Secondly, whether the certificate and decision of the architect of the 28th of June, 1850, given under the circumstances above set forth, was
 *28] conclusive on the *plaintiffs with respect to the amount claimed by them, as a binding decision of a dispute, within the terms of the conditions in that behalf.

Upon the court having given its decision on the above questions, the case was to be remitted to the arbitrator.

Hayes, Serjt., for the plaintiffs.(a)—1. The clause in the conditions,

(a) The points marked for argument on the part of the plaintiffs were as follows :—

"1. That the necessity of the architect certifying the amount payable to the plaintiff only applied to payments made on account, before the completion of the work; and that, in respect of a final balance due after completion, the contract and conditions only required a certificate of the fact of final completion :

"2. That the architect was not empowered by the conditions to decide on the final balance

ante, p. 12,—which provides for the settlement of differences or disputes by the architect, has reference only to differences or disputes relative to the building and works during their progress, and clearly was not intended to clothe the architect with an arbitrary power to determine as to the final balance due to the plaintiffs after the completion of the building. Besides, the arbitrator finds that no dispute or difference existed in point of fact. [*Field* intimated that the defendants did not mean to rely upon that point.]

2. It will be contended on the part of the defendants, that, to entitle the plaintiffs to recover the sum which might be due to them on the completion of the work under the contract, it was necessary that the architect should certify, not merely that the work had been completed to his satisfaction, but also the amount due in respect of it. The plaintiffs are bound to show that the architect has certified the completion of the building and works; but it is submitted that such certificate need not contain a statement of the final balance. The certificate of the 27th of February, 1849 [ante, p. 18], of itself might be relied on as a certificate of final completion within the terms of the contract: but it does not rest there; for, on the 25th of September, the architect sends in a report to the Gaol Committee, in which he informs them that “the gaol may now be considered as complete; very few matters still requiring to be done;” and these the arbitrator finds were matters which were not to be done by the plaintiffs as part of the contract. Further, on the 8th of July, 1850, the architect again writes,—“I have the honour of reporting, for your information, that the works at the new gaol contracted for by Messrs. Pashby & Plevins are now finished,” &c. [CRESSWELL, J.—Are the certificates to be given with reference to extras or alterations? If not, and they are to apply only to the contract work, it was not necessary that the certificate of completion should state the amount remaining due. But, if that be so, the extra work is left altogether at large, to be ascertained according to measure and value.] Ninety per cent. has been paid upon the contract price and for extra work. The statement of the amount in the architect’s certificate was only necessary in order to ascertain the rates of payment which the plaintiffs were entitled to under the terms of the contract, until 90 per cent. of the work was done.

Bovill (with whom was *Field*), for the defendants.(a)—The only

claimed after completion of the work; and that, if he had such power, his decision under the circumstances stated, before any dispute as to the balance had arisen, upon an ex parte communication from the defendants, and without hearing the plaintiffs, or any evidence, was not binding.”

(a) The points marked for argument on the part of the defendants, were as follows:—

“1. That, in the absence of a certificate by the architect that the amount sought to be recovered in this action was payable to the plaintiffs, they were not entitled to recover it:

“2. That there had been no sufficient certificate of the architect, of final completion:

“3. That the architect was empowered by the conditions to decide, and had in fact decided, that nothing was due to the plaintiffs; that his decision was binding on them; and that the circumstances relied on by the plaintiffs were no answer to the decision.”

*30] question for the court now is as to the *construction of the contract. It provides that the work shall be done according to certain conditions, specifications, and drawings, for the sum of 33,469*l.* 11*s.* 5*d.* It further provides that no extra work shall be done without the written authority of the architect; that the value of such extra work shall be ascertained by the architect; and that no allowance shall be made for such extra work, unless the value thereof is ascertained at the time, and entered in a book to be kept for that purpose and submitted to and approved of by the architect. The plaintiffs have received the whole amount of the contract work; and they now claim measure and value for the extras. The architect, on the 8th July, 1850, certified that 59*l.* 7*s.* 2½*d.* was due to the plaintiffs as the balance of their contract, and 3923*l.* 16*s.* 4½*d.* as the balance for extra works: and that amount has been paid. The stipulation in the contract [p. 9], that the value of all alterations, additions, or omissions shall be ascertained by the architect, and added to or deducted from the amount of the contract, as the case might be, and that no allowance for alterations, additions, or omissions should be made, unless the value thereof was ascertained at the time the work was done, and entered in a book kept for that purpose,—determines the question. The entry in the book only gives the plaintiffs a right to have the amount of extras considered by the architect. [CRESSWELL, J.—In answering the questions put to us by the arbitrator, we must assume that all that has been done. WILLES, J.—The intermediate certificates are for the benefit of the builders,—to enable them to obtain

*31] payments on account during the progress of the work. *The amount of the extra work is ascertained by the entries in the book. JERVIS, C. J.—Suppose no certificates given at all, the builders not requiring any money until the whole work was completed,—would it be necessary in that case that the architect's certificate of completion should mention the amount?] The intermediate certificates would necessarily contain the extras. [JERVIS, C. J.—The certificates to enable the builders to obtain periodical payments, would only contain the approximate value. It may be a question whose duty it is to keep the book.] Assume that the architect has valued the extra work, and it is duly entered in the book, then the value has been ascertained. [JERVIS, C. J.—The only question for us at present, is, as to the mode of ascertaining the value. The fact of its being entered in a book may be a good reason why it should not be necessary for the final certificate to find the amount.] The conditions prescribe that “no payments shall be made to the contractors, except on the production of a certificate from the architect, that a certain amount of work has been done,” &c. That provision could not have been meant to apply to the intermediate certificates only.

Hayes, Serjt., in reply, was stopped by the court.

JERVIS, C. J.—The arbitrator in this case has put two questions to

the court,—first, whether, under the terms of the contract and conditions with respect to certificates, the plaintiffs are precluded from recovering any balance claimed by them,—secondly, whether the certificate and decision of the architect of the 28th of June, 1850, given under the circumstances set forth in the case, is conclusive on the plaintiffs with respect to the amount claimed by them, as a binding decision of a dispute within the terms of the conditions. The latter *question Mr. *Bovill* very [*82 properly declines to argue: and our answer to the first will not, I fear, properly enable the arbitrator to determine the matter. Upon that first question, however, I think our decision must be in favour of the plaintiffs. I do not think that the architect's certificate of the final completion of the work need contain any mention of the amount; but I think the plaintiffs may recover on a general certificate. The true construction of the contract and conditions appears to me to be this,—the fourteen days' certificates are to contain an approximate estimate of the value of the work done (including, it may be, the extra work, which is to be entered in a book), to the extent of 90 per cent.; and then no further payments are to be made to the contractors until a certificate of final completion to the satisfaction of the architect is obtained, when the balance is to be paid according to the terms mentioned in the contract. It seems to me that it is not a condition precedent to the plaintiffs' right to recover what may be due to them for the balance, that such balance should be ascertained and mentioned in the certificate of the final completion given by the architect.

CRESSWELL, J.—I am of the same opinion. The certificate of final completion is clearly sufficient without reference to the amount that may be due to the contractors, whether in respect of work done under the contract or of alterations or additions.

CROWDER, J.—I am of the same opinion. The simple question for us to decide, is, whether, under the terms of this contract, the plaintiffs are precluded from recovering the balance due to them without a certificate of the architect finding the amount. It appears that certificates have been given periodically to enable the contractors to obtain the payments stipulated for during *the progress of the work; and that the architect has certified its final completion. I am of opinion [*88 that the certificate of final completion need not mention the amount that remains due. As far as regards the work done within the contract, it clearly could not be necessary; and the provision for the entry of the extra work and additions in a book seems to me to show that it is equally unnecessary so far as they are concerned.

WILLES, J.—I am of the same opinion. As to the second question, there is no dispute between the parties: it is clear that there could be no *res judicata* where there was no *lis*. As to the other question, the provision in the contract is, that no further payment (beyond the periodical payments made upon the architect's certificates given during the

progress of the work up to the completion of 90 per cent. thereof) shall be made to the contractors "until three calendar months after the architect shall have certified the completion of the whole work to his satisfaction, when one-half of the remainder shall be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion." The architect *has* certified that the whole of the work has been completed to his satisfaction; and the three months and twelve months have elapsed. The certificate in question is for the balance remaining unpaid in respect of the work done under the contract, and the alterations and additions. It is said that the certificate must state the amount due. There is, however, no provision for that in that part of the contract which I have read. Here is a certificate of the architect that the whole of the work has been completed to his satisfaction. The other provision which has been referred to applies to the intermediate certificates only. It is clear that the final certificate need show no more *³⁴] than *the completion of the whole work. That view of the matter is considerably fortified by a reference to that part of the conditions which requires the particulars and the amount of alterations and additions to be entered in a book. Judgment for the plaintiffs.

MARSDEN v. OVERBURY. April 28.

The court granted a habeas corpus ad testificandum to bring up a prisoner in criminal custody for the purpose of giving evidence before an arbitrator.

HORACE LLOYD moved for a writ of habeas corpus ad testificandum to bring up the body of one Henry Ridout Downman, a prisoner in custody *⁸⁵] in the Queen's Prison in civil suit, (a) for the purpose of *his being examined as a witness before an arbitrator. He referred to *Graham v. Glover*, 25 Law Journ. Q. B. 10, (b) where the Court of Queen's Bench granted a habeas to bring up a prisoner for the purpose of being

(a) For the course of proceeding where the proposed witness is in criminal custody, see the following provision,—which is oddly enough thrust into "An act for the better prevention and punishment of aggravated assaults upon women and children, and for preventing delay and expense in the administration of certain parts of the criminal law,"—16 & 17 Vict. c. 30, s. 9. "It shall be lawful for one of Her Majesty's principal secretaries of state, or any judge of the Court of Queen's Bench or Common Pleas, or Baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial, or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or other judicature, shall be so brought, under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of habeas corpus awarded by any of Her Majesty's superior courts of law at Westminster to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

(b) And see *Geery v. Hopkins*, 1 Lord Raym. 851, there cited.

examined before an arbitrator appointed to settle a special case for the opinion of the court under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 5.

Per Curiam.—That case seems to be an authority. The writ may therefore go. Rule accordingly. (a)

(a) The application for a habeas corpus ad testificandum should be made to a judge at chambers, and not in court. *Browne v. Gisborne*, 2 Dowl. N. S. 963.

*CLOSMADÉUC v. CARREL. May 7.

[*36]

An unstamped charter-party was within the fourteen days allowed by the 5 & 6 Vict. c. 79, s. 21, for stamping such instruments without payment of a penalty, delivered at the office of the sub-distributor of stamps at C., for the purpose of its being transmitted to London to be stamped, the proper amount of stamp-duty and postage being left with it. The clerk in that office to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands; but they said, that, if it did, it would in usual course be returned to the district-office in the country. The clerk at C. could not say whether the document was returned to him or not; but he stated, that, on search being made for it, no trace of it could be discovered :—
Held, that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents.

THIS was an action upon a charter-party alleged to have been executed at Cardiff.

At the trial before Jervis, C. J., at the sittings in London after Hilary Term last, in order to let in secondary evidence of the contents of the charter-party, the plaintiff proved, that a charter-party for the ship *Emile*, the vessel in question, was entered into between himself and the defendant in May, 1855, at Cardiff; that the document was unstamped at the time of its execution; and that, within the time allowed by the statute (a) for stamping documents of that description, *the charter-party was taken to the proper office at Cardiff, for the purpose of [*37]

(a) The 5 & 6 Vict. c. 79, s. 21, which enacts "that it shall not be lawful for the commissioners of stamps and taxes, or any of their officers, to stamp or mark any vellum, parchment, or paper upon which any bill of lading, or any charter-party, or any agreement, contract, memorandum, letter, or other writing by this act chargeable with any duty as a charter-party, shall be engrossed, written, or printed, under any pretence whatever, after the same shall be executed or signed by any party, except as herein is provided; and, if any person shall make or sign any bill of lading which shall be engrossed, printed, or written, or partly engrossed or written and partly printed, upon vellum, parchment, or paper, not duly stamped according to law, every such person shall forfeit the sum of 50*l*.: Provided always, that, if any charter-party, or any such agreement, contract, memorandum, letter, or writing chargeable with any duty as a charter-party, shall be brought to the head office of the said commissioners, or to any of their proper officers, to be stamped, within fourteen days after the same shall bear date and shall have been executed or signed by the party thereto who shall have first executed or signed the same, it shall be lawful for the said commissioners and they are hereby required, to cause the same to be stamped, upon payment of the duty chargeable thereon, without any penalty; and, if the same shall be brought to the said head office to be stamped at any time after the expiration of such fourteen days, and within one calendar month after the same shall bear date and shall have been first executed or signed as aforesaid, it shall be lawful for the said commissioners, and they are hereby required, to cause the same to be stamped upon payment of the duty chargeable thereon, and of the further sum of 10*l*. by way of penalty."

its being transmitted by the subdistributor of stamps to Somerset House to be stamped, the amount of the stamp-duty, 5s., and 3d. for the postage, being at the same time paid to a clerk at the former place.

The clerk in the office of the subdistributor of stamps at Cardiff to whom the charter-party was alleged to have been delivered, stated that he duly transmitted to London by the next post all documents left with him for that purpose; that he recollected having received in the month of May last several charter-parties from the broker who prepared the charter-party in question, but could not undertake to say whether or not this particular one was returned to the office at Cardiff; but that, notwithstanding he had made diligent search there, no trace of it could be discovered.

The clerks called from the stamp-office at Somerset House were unable to say whether or not the particular document had been received or returned by them; but they said, that, if received by them, it would in the usual course have been returned to the district office at Cardiff. They further stated, that an index is kept of London documents, but no record of documents from the country.

On the part of the defendant, it was submitted, that there was no
 [*88] sufficient evidence that the original *document had been stamped; and that, as the onus of proving the affirmative lay upon the plaintiff, enough had not been shown by him to let in secondary evidence of its contents.

For the plaintiff it was insisted, that, inasmuch as it had been proved that the charter-party had been in due time sent to the proper office, and that the proper amount of duty and postage had been paid, the presumption would be that the document was duly stamped, and therefore secondary evidence was admissible.

His Lordship thought that secondary evidence was under the circumstances inadmissible, and accordingly nonsuited the plaintiff.

Channell, Serjt., in Hilary Term last, obtained a rule nisi for a new trial, on the ground of the improper rejection of evidence.—He submitted that the evidence offered at the trial raised a presumption that the document had been stamped, or at all events threw upon the defendant the burthen of proving it unstamped: and he referred to *The King v. The Inhabitants of Long Buckby*, 7 East, 45, *Crisp v. Anderson*, 1 Stark. N. P. C. 35 (E. C. L. R. vol. 2), *Hart v. Hart*, 1 Hare, 1, *Crowther v. Solomons*, 6 C. B. 758 (E. C. L. R. vol. 60), and *Pooley v. Goodwin*, 4 Ad. & E. 94 (E. C. L. R. vol. 31), 5 N. & M. 466 (E. C. L. R. vol. 36).

Mellish (with whom was *Byles*, Serjt.), on a former day in this term, showed cause.—The question whether the document was stamped or not, was a question of fact to be decided by the judge at the trial. The only point for the consideration of the court now, is, whether there was any evidence before him upon which the Lord Chief justice was justified

in coming to the conclusion he came to. That the charter-party was unstamped at the time of its execution, is conceded. The result of the evidence given, was, that the document was taken to *the proper [39 office at Cardiff for the purpose of being sent to London to be stamped, and that nothing more was heard of it. There was no proof that it ever left Cardiff. [JERVIS, C. J.—The clerk proved that it was the course of business at the office to send off all documents that came there by post the same evening.] If nothing more appeared, that might lead to the presumption that the charter-party was duly posted, and taken to the stamp-office in London, and there stamped, and returned in due course to Cardiff, and there given back to the broker's clerk when he called for it. But, when once a link in the chain is broken, the whole presumption falls to the ground. At the time the document was last seen, it was unstamped. It appearing that it had not arrived back at Cardiff, what ground is there for supposing it to have been lost at one period rather than at another? In the ordinary case of a notice of dishonour sent by post, the fact of the letter (properly addressed) containing it being duly put into the post raises a presumption that the notice duly arrives at its destination. [CRESSWELL, J.—Not against proof that it did *not* arrive.] In *Doe d. Knight v. Nepean*, 5 B. & Ad. 86 (E. C. L. R. vol. 27), it was held, that a person who has not been heard of for seven years, is presumed to be dead, but that there is no legal presumption as to the time of his death, and that the fact of his having been alive or dead at any particular period during the seven years, must be proved by the party relying on it. (a) The burthen lies upon the party producing the instrument, to show that it was duly stamped. For that purpose, he may rely on presumption until the contrary appears: but, when the contrary does appear, as it is submitted it does here, the presumption will not help him: *Crisp v. Anderson*, 1 Stark. N. P. C. 35 (E. C. L. R. vol. 2). And there is nothing *inconsistent with this [40 in any of the cases cited. *Crowther v. Solomons* is a distinct authority in favour of the defendant. There, upon the defendant's refusal, after notice, to produce at the trial the original of an agreement on which the plaintiff relied, a witness for the plaintiff produced an unstamped copy; but, on his cross-examination, he stated that the original agreement was not stamped at the time it was executed and acted upon; and it appeared that the plaintiff's attorney had had inspection of the original shortly before the action: and it was held, that the presumption of the document's being regularly stamped,—which would have arisen from the defendant's refusal to produce it,—being thus rebutted, the copy was properly rejected. In giving judgment, Wilde, C. J., says: "The plaintiff is to sustain his case. This he can only do by producing the agreement. Whose duty is it to show what stamp is impressed on it? Why, clearly, that of the party who has occasion to set

(a) Affirmed in the Exchequer Chamber,—*Nepean v. Doe d. Knight*, 2 M. & W. 894.†

it up." That, it is submitted, is the true rule. [CRESSWELL, J.—He is not bound to prove it by *direct* evidence.] Where the contrary once appears, he must produce some evidence to show that it is more likely that the instrument *was* stamped than that it was not.

Channell, Serjt., and *John Henderson*, in support of the rule.—In none of the cases has evidence so strong as that offered in the present case been given. It was shown that the public officer at Cardiff whose duty it was to do so, received the charter-party within the time prescribed by the statute, for the purpose of transmitting it to London to be stamped, receiving at the same time the proper amount of stamp duty chargeable on the instrument, and the amount of postage. Under these circumstances, it is to be presumed that the officer at Cardiff did his *41] duty in sending the charter-party to London, and *that the persons in London whose duty it was to receive and cause it to be stamped, and to return it to the officer at Cardiff, also did their duty. It may at once be conceded that the presumption so arising avails only until met by contrary proof. [JERVIS, C. J.—There was positive evidence that the document was unstamped when last seen.] No doubt: and, if there had been any affirmative evidence that it was lost before it reached the stamp-office in London, the case would not be arguable. [JERVIS, C. J.—How could I say it was not?] When lost, under the circumstances, was perfectly immaterial; because, in the absence of evidence either way, the presumption of law is, that all the parties did their duty. Lord Ellenborough, in *Crisp v. Anderson*, 1 Stark. N. P. C. 35 (E. C. L. R. vol. 2), would have acted upon that presumption, if it had not afterwards been proved that the agreement was unstamped, which superseded the presumption. The same remark to a certain extent applies to *Crowther v. Solomons*, 6 C. B. 768 (E. C. L. R. vol. 60). There, the presumption was cut down by the two circumstances mentioned in the report, viz., the statement of the plaintiff's witness on cross-examination that the original agreement was not stamped at the time it was executed and acted upon, and the fact that the plaintiff's attorney had inspected it shortly before the commencement of the action. The rule is well laid down by Vice-Chancellor Wigram in *Hart v. Hart*, 1 Hare, 1, 5. "The objections," he says, "were two:—First, it was said that the loss of the agreement was not so proved as to entitle the defendant to sustain his case by secondary evidence; and, secondly, it was said, that, if the first objection failed, the secondary evidence could not be received without proof being given by the defendant that the agreement itself was duly stamped. If the latter of these objections were valid, it would be unnecessary to consider the former; and I will there- *42] fore first consider *the second objection. At the close of the argument, I expressed myself strongly against this objection, and, after an examination of the authorities upon the subject, I find my previous

impressions confirmed. Mr. Starkie, indeed, says, (a) that, previous to the admission of secondary evidence to prove the contents of a deed or other instrument which has been lost or destroyed, evidence is necessary to show that it was properly stamped. He does not, however, refer to any cases which support that proposition. Mr. Phillipp, in his book on Evidence, (b) says, 'Where an unstamped copy of an instrument is produced, it may under various circumstances be presumed that the original was stamped.' The special circumstances of the cases of *The King v. The Inhabitants of Long Buckby*, 7 East, 45, and *Crisp v. Anderson*, 1 Stark. N. P. C. 35, may explain the apparent caution with which Mr. Phillipp has expressed himself. But the late case of *Pooley v. Goodwin*, 4 Ad. & E. 94 (E. C. L. R. vol. 31), 5 N. & M. 466 (E. C. L. R. vol. 36), leaves no doubt upon my mind as to the correctness of the conclusion I have come to. It is manifest that the greatest injustice might ensue, if, in the case of a lost instrument, the presumption of regularity, upon a merely collateral point, were not raised in favour of the parties claiming under it. The proposition on which I rely, is, not that the copy of an unstamped instrument may be given in evidence where the original is lost,—*The King v. The Inhabitants of Castlemorton*, 3 B. & Ald. 588 (E. C. L. R. vol. 5); *Rippiner v. Wright*, 2 B. & Ald. 478; but that the onus of proving the want of a stamp lies upon the party who raises the objection. The principles upon which courts of law refuse to admit secondary evidence of the contents of written instruments, have no application to an objection which arises only under the policy of the *revenue laws." That is the true rule; and it was recognised as such by Williams, J., in *Crowther v. Solomons*. Take the ordinary case of a contract evidenced by letters between two distant places,—Liverpool and London, for instance,—the contract would be proved by the production of the letter containing the offer, and proof of the posting of the letter containing the acceptance; and this on the ground that the presumption is that the course of the post is correct. The case of the notice of dishonour of a bill of exchange may be open to some difficulty. [JERVIS, C. J.—Non constat that this instrument was ever put into the post at Cardiff. That would be the presumption, if we are to look for motives.] To suppose that, would be to suppose that the clerk who received it at Cardiff put the money into his pocket. But the court will not go out of its way to infer the commission of a crime.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court :—

In this case, the plaintiff was nonsuited at the trial before the Lord Chief Justice, at the London Sittings after last Hilary Term. The nonsuit proceeded on the ground that the plaintiff had failed to give evidence of a charter-party on which the action was founded. A rule

(a) 2 Starkie on Evidence, 2d edit. p. 770.

(b) 2 Phillips on Evidence, 8th edit. p. 683.

nisi for setting aside the nonsuit was granted, it being contended that the Lord Chief Justice had improperly rejected secondary evidence of the charter-party.

Evidence was given before him of the execution of a charter-party at Swansea, which at that time was unstamped; and that, within the fourteen days allowed by the 5 & 6 Vict. c. 79, s. 21, for stamping such instruments without payment of a penalty, it was taken to the proper *44] office at Cardiff, and the stamp-duty and *postage paid, in order that it might be sent to London to be stamped. The clerk in that office to whom it was delivered, proved that he sent to London all documents left with him for such purpose. The clerks in the office in London were not able to say whether such a document ever reached their hands or not, but stated, that, if it did, it would in usual course be returned to the district office in the country. The clerk there could not say whether such a document was or was not returned; but, upon search being made for it, no trace of it could be discovered.

Upon this evidence, showing that the supposed charter-party was unstamped when executed, the Lord Chief Justice thought that the plaintiff ought to prove that it was afterwards stamped, and had failed to do so, and that, consequently, secondary evidence could not be received.

The general rule on this subject was hardly disputed, on argument, viz., that, where a party objects to the reception of secondary evidence of a lost document, on the ground that the original required a stamp, and had it not, he must prove that it was not stamped. Lord Ellenborough so ruled in *Crisp v. Anderson*, 1 Stark. N. P. C. 34; and that was confirmed by the Court of Queen's Bench in *Pooley v. Goodwin*, 4 Ad. & E. 94 (E. C. L. R. vol. 31), 5 N. & M. 466, and by Vice-Chancellor Wigram in *Hart v. Hart*, 1 Hare, 1. In *Crowther v. Solomons*, 6 C. B. 758 (E. C. L. R. vol. 60), Williams, J., expressed himself strongly to the same effect, and the rest of the court said nothing to the contrary, but considered that in that case Wilde, C. J., was justified in assuming that a document shown to have been unstamped when executed, continued in the same state: and the true question in the present case, is, whether the Lord Chief Justice was justified in inferring from the evidence that the *charter-party, which was certainly unstamped *45] when executed, continued in the same state until the time when it was lost or destroyed.

It was said, that, in order to justify him in assuming the contrary, he must assume affirmatively that something more was done after it was executed: and it was asked,—why should he presume it? Not on the ground that “omnia ritè acta esse presumuntur,” for it was not the plaintiff's duty to do it or have it done. The matter was indifferent: he might do it or leave it undone with equal propriety. There was,

therefore, no ground for presuming that the charter-party was stamped, in the absence of evidence on the subject.

It was further contended that the evidence given did not show that the instrument was stamped: and the argument on this point was presented thus:—The receipt of the money by the clerk at Cardiff made it his duty to send the document to London: it was the duty of the servants of the postmaster-general to carry and deliver it in London: it was the duty of the proper officer at the stamp-office to have it stamped, and to return it; and the duty of the clerk in the country to re-deliver it. Some one of these persons failed to discharge his duty; and there was nothing to fix that failure on one rather than on another. It may, therefore, as probably have occurred before as after the stamping of the instrument. Again, therefore, the presumption of *omnia rite acta esse præsumuntur* fails, and consequently it remains quite uncertain whether it was ever stamped or not.

That is true. The plaintiff did not by that evidence prove that the charter-party was stamped. But, did the defendant prove that it was unstamped? for, the *onus probandi* lay on him. He showed that at one time it was unstamped; and, in the absence of any evidence to displace the presumption arising from that circumstance, *it might have been presumed that it remained in the same state. But the [*46 evidence of the payment of stamp-duty, and the sending of the instrument to London, and so forth, made it altogether uncertain whether it was afterwards stamped or not, and sufficed to get rid of the presumption, and to cast again upon the objector the burthen of proving the want of a stamp.

For this reason, it appears to us that secondary evidence of the contents was admissible, and that the rule for a new trial must be made absolute.

Rule absolute.

BARKER v. THE MIDLAND RAILWAY COMPANY. *May 6.*

An omnibus proprietor who carries passengers and their luggage, for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard.

Where there are cross-demurrers, the plaintiff's counsel begins.

THE first count of the declaration stated, that the defendants, being the Midland Railway Company mentioned in an act of parliament which was made and passed in the session of parliament holden in the 8th and 9th years of the reign of the now Queen [c. lvi.] intituled, "An Act to empower the Midland Railway Company to make a branch from the said railway near Syston, in the county of Leicester, to the city of Peterborough," made, under the authority of the said act, the branch railway, with divers works and conveniences connected therewith, by the said act authorized, one of such works being a

station called the Stamford Station, and maintained the same until and at the time of the committing the grievances hereafter mentioned: That, before and at the time of the committing of the grievances hereinafter mentioned, the defendants carried on the business of common carriers of passengers for hire and of common carriers of *47] *goods for hire, from the said Stamford Station to divers places, and from divers places to the said Stamford Station: That, before and at the time of the committing the grievances hereafter mentioned, the said Stamford Station communicated with a certain public carriage highway, by gates forming part of the said station, and so constructed as when open to allow the passage of carriages through the same from the said highway into the said station, and back again: That, before and at the time of the committing the said grievances, the defendants maintained, and there was, a carriage-road leading from the said gates to certain buildings in the said station, the same being the only carriage-way to the said buildings from the said highway: That, before and at the time of the committing the said grievances, the defendants, in so carrying on their said business, and as one of the modes by them pursued for so carrying on the same, habitually and publicly received passengers at the said buildings in the station, and habitually and publicly allowed such passengers respectively to enter the said station, either on foot or in a carriage or carriages drawn by one or more horses, and driven by such passengers respectively, or by some other person or persons, and habitually and publicly allowed such carriages respectively, with such passengers respectively, so to enter as aforesaid by the said gates, and to pass from the said gates along the said carriage-road to the said buildings, for the purpose of there, at the said buildings, contracting with the defendants for being carried as such passenger or passengers by the defendants: That, before and at the time of the committing the said grievances, the defendants, in so carrying on their said business, and as one of the modes by them pursued for carrying on the same, habitually and publicly received goods for carriage at the said buildings, and habitually and publicly allowed persons respectively *48] bringing such *goods to them, the defendants, to be carried by the defendants as such common carriers, to bring such goods in a carriage or carriages drawn by one or more horses, from the said highway, through the said gates, along the said carriage-road, to the said buildings, for the purpose of there delivering such goods to the defendants to be carried by the defendants as such common carriers: That, before and at the time of the committing of the said grievances, the defendants, in so carrying on their said business, and as one of the modes by them pursued for carrying on their said business, habitually and publicly allowed persons respectively to bring a carriage or carriages drawn by one or more horses from the said highway, through the said gates, along the said carriage-road, to the said buildings, for the pur-

pose of taking away from the said buildings any person or persons, when such last-mentioned person or persons expecting to be carried and deposited as a passenger or passengers by the defendants to and at the said station had directed any such person or persons to meet such expected passenger or passengers with such carriage or carriages at the said station for the purpose of taking such passenger or passengers from the said station : That, before and at the time of the committing the said grievances, the plaintiff carried on the business of carrying persons, and of carrying goods, in a carriage called an omnibus, drawn by one horse, for reward to the plaintiff and for the obtaining of his livelihood : And that, on divers occasions after the passing of the Railway Traffic Act, 1854 [17 & 18 Vict. c. 31], the plaintiff, in the way of his said business, was desirous of entering, and was about to enter, the said station, from the said highway, by the said gates, with an omnibus drawn by one horse, and driven by him, for the purpose of carrying therein divers passengers, from the said gates, along the said carriage-road, to the said buildings, *in order that such *passengers might, at the said buildings, contract with the defendants for being carried as passengers* [*49 *by the defendants in the way of their said business* : Yet that the defendants, on the said last-mentioned occasions, well knowing the premises, but wilfully and maliciously intending to injure the plaintiff, and to prevent him from enjoying and availing himself of the mode of carrying on their business so by the defendants in that behalf pursued as aforesaid, and in pursuance of a previous determination of the defendants not to allow the plaintiff on any occasion, in the way of his said business, to enjoy or avail himself of any of the modes of carrying on their business so by the defendants pursued as aforesaid, did not nor would permit the plaintiff to enter the said station by the said gates, or otherwise, with his said omnibus so by him then driven as aforesaid, and drawn by one horse as aforesaid, and wrongfully and maliciously refused so to do, and prevented the plaintiff from so entering, although each of the said occasions was a reasonable time for the plaintiff so to enter with his said omnibus so by him then driven as aforesaid, and drawn by one horse as aforesaid, and was not a time when in consequence of any of the works being out of repair, or from any other sufficient cause, it was necessary to close the railway, or any part thereof, or to close the said station or works, or any part thereof.

The second count stated, that, on divers occasions after the passing of the said last-mentioned act, the plaintiff, in the way of his said business, was bringing to the defendants goods for carriage by the defendants in the way of their said business, and was so bringing such goods in an omnibus drawn by one horse, and was desirous of entering the said station from the said highway, by the said gates, for the purpose of carrying in the said omnibus the said goods along the said carriage-road

*50] to the said buildings, in order that he might there deliver *such goods to the defendants for carriage by the defendants as aforesaid: Yet that the defendants, on the last-mentioned occasions, well knowing the premises, but wilfully and maliciously intending to injure the plaintiff, and to prevent him from enjoying and availing himself of the mode of carrying on their business so as aforesaid by the defendants in that behalf pursued, and in pursuance of the said previous determination of the defendants, did not nor would permit the plaintiff to enter the said station by the said gates, or otherwise, with his said omnibus, drawn by one horse as aforesaid, and wrongfully and maliciously refused so to do, and prevented the plaintiff from so entering, although each of the last-mentioned occasions was a reasonable time for the plaintiff so to enter with his said omnibus drawn by one horse as aforesaid, and was not a time when in consequence of any of the works being out of repair, or from any other sufficient cause, it was necessary to close the railway, or any part thereof, or to close the said station or works, or any part thereof.

The third count stated, that, on divers occasions after the passing of the last-mentioned act, the plaintiff, in the way of his said business, was desirous of bringing, and was about to bring, an omnibus, drawn by one horse, from the said highway, through the said gates, along the said carriage-road, to the said buildings, for the purpose of taking away from the said buildings on each of the said occasions a person who, expecting to be carried and deposited as a passenger by the defendants to and at the said station, had directed the plaintiff to meet such expected passenger, with the said omnibus, at the said station, for the purpose of taking such passenger from the said station: Yet the defendants, on the last-mentioned occasion, well knowing the premises, but wilfully and maliciously intending to injure the plaintiff, and to prevent him from enjoying and availing *himself of the mode of carrying on their business *51] so by the defendants in that behalf pursued, as aforesaid, and in pursuance of the said previous determination of the defendants, did not nor would permit the plaintiff to enter the said station by the said gates, or otherwise, with his said omnibus, drawn by one horse as aforesaid, and wrongfully and maliciously refused so to do, and prevented the plaintiff from so entering; although each of the last-mentioned occasions was a reasonable time for the plaintiff so to enter with his said omnibus drawn by one horse as aforesaid, and was not a time when in consequence of any of the works being out of repair, or from any other sufficient cause, it was necessary to close the railway, or any part thereof, or to close the said station or works, or any part thereof: By means whereof, the plaintiff's said business was greatly diminished and injured, and he was prevented from carrying the same on in so beneficial and ample a manner as he otherwise would have done, and the value of the goodwill of his said business, and the amount of his said business, were

greatly injured, and made much less than they otherwise would have been.

And for a fourth count the plaintiff said that he complained of the said conduct of the defendants in the premises on the several occasions in the first, second, and third counts mentioned, and whereof he in those counts complained, as being a neglect and omission and refusal, contrary to the form of the last-mentioned act of parliament, on the part of the defendants, according to their powers, to afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their said branch railway, which at the several times of committing the said grievances belonged to the defendants; the entry of his said omnibus into the said station on each of the said occasions, for the respective *purposes aforesaid, being such a reasonable facility as aforesaid, [*52 and one which the defendants might have afforded on each of the said occasions according to their said powers: by means whereof the plaintiff sustained damage similar to that whereof he above complained.

The defendants pleaded to the first, second, and third counts,—secondly, that, at the time of committing the alleged grievances in those counts respectively mentioned, the said station therein mentioned was the private station, and the said gates and carriage-road therein respectively mentioned, were the private gates and carriage-road of the defendants; and such station, gates, and carriage-road, respectively, were in and upon land whereof the defendants were the sole and exclusive owners and occupants; whereof the defendants, as they lawfully might, refused to permit the plaintiff to enter, and prevented him from entering the said station from the said gates, along the said carriage-road.

They also demurred to the first, second, and third counts, the grounds of demurrer stated in the margin, being, that “neither of those counts showed any right on the part of the plaintiff to enter the station, nor, consequently, any wrong by the defendants in preventing him from entering;” and to the fourth count, on the ground that “the said fourth count does not disclose any cause of action, and is founded on a misapprehension of the statute for facilitating traffic arrangements.” Joinder in demurrer.

The plaintiff demurred to the second plea, the ground of demurrer being, “that, under the circumstances stated in the first three counts of the declaration, the plaintiff was entitled to enter the station with his omnibus, though it (the station) was the property and in the possession of the defendants.” Joinder.

**Beasley* (with whom was *Byles*, Serjt.), for the plaintiff.(a)—The question is, whether the railway company are the owners of the [*53

(a) The points marked for argument on the part of the plaintiff, were as follows:—

“That the company, as common carriers, are bound to give the plaintiff the same facilities as they allow the public in the usual course of conducting their business: that the public are entitled to enter a carrier’s premises for the purpose of going to that part thereof where the carrier receives goods, and to enter it with the ordinary convenience for the delivery of goods:

station and its approaches so exclusively as to be entitled to refuse access thereto at all seasonable times by a party desirous of using it as this plaintiff is shown by the record to have been. The soil of their railway and premises is, it is submitted, vested in the company only sub modo,—for the limited purpose for which it is conveyed to them. If the action *54] had been brought by one desirous of becoming a passenger by the railway, there can be no doubt that the company would be liable; *Benett v. The Peninsular and Oriental Steamboat Company*, 6 C. B. 775 (E. C. L. R. vol. 60). (a) Have they, then, a right to exclude from their station a public vehicle? They are bound to give all reasonable facilities to the public; and, as public carriers, their premises must be open to all the world, without favour or preference, for the conveyance of passengers or goods. Parke, B., in *Johnson v. The Midland Railway Company*, 4 Exch. 367, 372,† says: “At common law, a carrier is not bound to carry for every person tendering goods of any description, but his obligation is, to carry according to his public profession. The law is thus stated by Holt, C. J., in *Lane v. Cotton*, 12 Mod. 484: ‘Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see *Keilwey*, 50. If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King’s subjects that will employ him in the way of his trade; *Keilwey*, 50. If an inn-keeper refuse to entertain a guest when his house is not full, an action will lie against him,—*White’s Case*, *Dyer*, 158; *Godbolt*, 846; and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported.’ With respect

that, as a carrier is bound to receive the goods of all persons alike, so, as incident to that obligation, he is bound to allow to all alike the same opportunity and facilities for delivering goods: that the same obligation exists as to passengers; and that, generally, the carrier’s being a public business, the carrier is bound to treat all persons alike: that the treatment of the plaintiff was, as against him, a closing of the railway, within the meaning of s. 108 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, and s. 220 of the Midland Railway Company’s Act, 7 & 8 Vict. c. xviii., the word ‘railway’ by the interpretation clause of each act [s. 3 of the former act, and s. 264 of the latter] including ‘works:’ and that the road into and in a station under those acts, is, when not lawfully closed, a public way for all persons having lawful occasion to use it, and may be used by all such persons alike.”

In the Queen’s Bench, it seems, that formerly, where there were cross-demurrers, the party first demurring began: *Hilton v. Earl Granville*, 13 Law Journ. Q. B. 193. But, in this court, and also in the Exchequer, the rule was, that if there were demurrers on both sides, the plaintiff began: *Franks v. Price*, 6 Scott, 174; *Bourne v. Seymour*, 17 C. B. 337, 342 (E. C. L. R. vol. 84); *Williams v. Jarman*, 13 M. & W. 128,† 2 D. & L. 212, 14 Law Journ. Exch. 156. And, in a very recent case, the Court of Queen’s Bench adopted the same rule: see *Halhead v. Young*, Q. B., E. T. 1856.

(a) And see *Crouch v. The London and North Western Railway Company*, 14 C. B. 255 (E. C. L. R. vol. 78).

to the case of a *smith, there is a learned note of my Brother Manning's to the case of *Parsons v. Gingell*, 4 C. B. 555 (E. C. L. R. vol. 56), in which he intimates that the authorities do not support the proposition. In the case of an inn-keeper, there is no question that the action will lie. So also in the case of a carrier; and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only; for instance, cattle, or dry goods; in which case he could not be compelled to carry any other kind of goods: or, he may limit his obligation to carrying from one place to another, as, from Manchester to London, and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tenders the money at the time, and there is room in the conveyance) has a right to call upon him to receive and carry goods according to his public profession." Here the declaration clearly shows a breach of that duty on the part of the defendants. In the case of a carrier who collects parcels and packages for transmission by railway, it has been held over and over again that the company are bound to give him equal facility in the use of their railway and carriages as they afford to the rest of the public.^(a) [JERVIS, C. J.—In that case, the collector has a special property in the parcels so intrusted to him, and which the company refuse to carry. Here, the company do not refuse to carry the passengers brought by the plaintiff's omnibus.] Suppose a man desirous of travelling by the railway is unable to walk,—has he not a right to be carried into the company's station in a public vehicle? [JERVIS, C. J.—*He* would no doubt have a right of action if unduly obstructed. But that is not this case.] The *2d section of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, shows the anxiety of the legislature to compel railway companies to afford all reasonable accommodation to persons using the railways: it enacts that "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company, &c., having or working railways or canals which form part of a continuous

(a) See *Parker v. The Great Western Railway Company*, 7 M. & G. 253, 292 (E. C. L. R. vol. 49), 7 Scott, N. R. 835, 873; *Parker v. The Great Western Railway Company*, 11 C. B. 545 (E. C. L. R. vol. 73), and *Edwards v. The Great Western Railway Company*, 11 C. B. 538.

line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unavoidable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." [JERVIS, C. J.—The object of that act was, to give specific remedies. CROWDER, J.—And it *57] "refers entirely to persons using or desirous of using the railway or canal.] The fourth count refers to that act, though it is not founded upon it, but is based on the common law. A railway is a public highway, which every member of the public has a right to use. [JERVIS, C. J.—Subject to the company's regulations. What right can an omnibus driver have to go upon the private property of the company?]

Phipson (with whom was *Macaulay*), contra, was stopped by the court.(a)

*58] JERVIS, C. J.—I am of opinion that the defendants are *entitled to the judgment of the court. The declaration proceeds upon the assumption that the station is the private property of the railway company, subject to the rights of the public using the railway. It is not pretended that the plaintiff was using or seeking to use the railway. What right, then, can he have to say to the company, "I will use your private property for my profit?" There is no pretence for the action. It has neither principle nor any colour of authority to sustain it. Nor does the 17 & 18 Vict. c. 31, give any such remedy as will support the fourth count.

(a) The points which were marked for argument on the part of the defendants, were as follows:—

"In support of the demurrers to the first, second, and third counts respectively, the defendants will contend that neither of the said counts discloses any cause of action; for, that there was no duty or obligation on the defendants to admit the plaintiff's omnibus into the interior of their station for the purposes or on the occasions therein respectively mentioned.

"In support of the demurrer to the fourth count, the defendants will contend,—that, by The Railway and Canal Traffic Act, 1854, a particular and exclusive remedy is prescribed for breach of its provisions by a railway company, and by the 6th section of that act no other proceeding can be taken except by the means and in the manner thereinbefore prescribed,—and that the supposed grievance or causes of complaint respectively are not violations or contraventions of any of the provisions of the said act.

"The same points will be urged as respects the first, second, and third counts, if the plaintiff seeks to treat the grievances in those counts respectively named as breaches of a public duty in contravention of the provisions of that act.

"In support of the second plea, the defendants will contend that the facts therein alleged, taken together with the averments in the first, second, and third counts respectively, afford a sufficient justification of the defendants' refusal to admit the plaintiff's omnibus, there being no duty or obligation on the defendants to permit all persons who may wish to ply to or from their station, to bring their vehicles into the private ground of the defendants."

CRESSWELL, J.—I entirely agree with the Lord Chief Justice that this action is destitute of all foundation in principle or authority. The plaintiff had no intention to use the railway, and therefore he has experienced no obstruction which gives him any right of action. He merely desired that other persons should use the railway. The statute 17 & 18 Vict. c. 31 gives remedies of a particular character for the acts thereby intended to be guarded against: but clearly it gives no action such as this.

CROWDER, J.—I am of the same opinion. This is not an action brought by a person wishing to travel by the defendants' railway or to send goods by it; but by a person who carries to and from the railway persons who are desirous of using or who have used the railway. He clearly is not a person who can complain of an obstruction. As to the fourth count, The Railway and Canal Traffic Act, 1854, is confined to the affording facilities to persons using or desiring to use a railway or canal. If any obstruction be offered in such a case, the party may avail himself of the remedy provided by that act.

WILLES, J.—I am of the same opinion. This action *is founded upon a supposed duty on the part of the defendants to permit the plaintiff to come upon their land,—a duty which is alleged to arise from their allowing the public generally to do so. It is not alleged that there has been any dedication of this place to the public: but it is said that it is the duty of a carrier to allow persons who bring passengers or goods to be carried, to enter his premises for the purpose of delivering there the passengers or the goods. It certainly would be somewhat extraordinary if any such right could exist in one to whom the company owes no direct duty, but who merely brings to the station the individuals with whom the company contracts. The case of *Pickford v. The Grand Junction Railway Company*, 8 M. & W. 372,† shows that this correlative duty between the contracting parties is essential to the maintenance of an action against a common carrier for refusing to carry. There is another ground also upon which this action is not maintainable: An action will not lie at the suit of A. for the breach by B. of a duty which he owes to C. I remember a case where a stage-coach passenger brought an action against the builder of the coach for an injury sustained by him from a defect in the vehicle. And the answer was, that an action would only lie as between the parties between whom the contract was made.

Judgment for the defendants.

*60] ***SIR JOHN BARKER MILL, Bart., Claimant; HER MAJESTY'S COMMISSIONER in Charge of the NEW FOREST, Objector. April 30.**

An allotment of waste land was made to A. under an enclosure act, passed in 1810. In respect of this allotment, A. claimed a right of common of pasture in the waste lands, and a right of pannage in the open woods of the New Forest, showing an enjoyment for the full period of thirty years, as of right, and without interruption, mentioned in the 2 & 3 W. 4, c. 71, s. 1:—Held, that the claim might be defeated by showing the commencement of the enjoyment, and that, by reason of the statutes 9 & 10 W. 3, c. 36, s. 10, and 1 Anne, stat. 1, c. 7, s. 5, the right claimed could not have had any legal origin in a grant from the Crown.

THE commissioners for the settlement of claims upon and over the New Forest, at a meeting duly convened and held at Southampton on the 28th of December, 1855, at the application of Sir John Barker Mill, Bart., a claimant of commonable and other rights over the said forest, prepared and submitted the following case for the opinion of this court:—

By the statute 17 & 18 Vict. c. 49, intituled “An act for the settlement of claims upon and over the New Forest,”—after reciting, that, under the provisions of divers former acts of parliament, certain claims of common and other rights in and over the said New Forest had been preferred and delivered, and certain of the said claims objected to, and that the validity or invalidity of large classes of the said claims depended upon the settlement of certain disputed points as to the existence or nature of the rights preferred by such claims, and that it was expedient that commissioners should be appointed for the purpose of deciding on the claims in manner thereafter mentioned,—it is enacted that the judge of the county court of Southampton, and two barristers-at-law to be appointed by the Lord Chief Justice of Her Majesty's Court of Queen's Bench, should be commissioners for the purposes of that act, to hear and determine all claims to common and other rights in and over the said forest, and their decision in the premises should be final, and bind all parties and rights whatsoever; and it is declared that all acts and decisions of any two of the commissioners should be taken as the *61] acts of the *commissioners, except that, in case they should differ in opinion on any point of law brought before them affecting any claim, they should, on the application of the party objecting, or of the party claiming, prepare a case, to be submitted to Her Majesty's Court of Common Pleas, to be argued before and decided on by the said court; and the judgment and determination of such court should be taken as the judgment of the commissioners.

At the meeting of the said commissioners above mentioned, held before Charles James Gale, Esq., the judge of the county court of Southampton, and James Barstow, Esq., one of the commissioners duly appointed in pursuance of the powers hereinbefore mentioned, a claim was duly made by the said Sir John Barker Mill, to have, for himself,

and for the farmers and tenants of a tenement whereof the said Sir John Barker Mill was seised in fee-simple, consisting of a messuage and about twenty-five acres of land in the parish of Eling, without the metes of the forest, and according to the assize of the forest, a right of common of pasture in all the waste lands and open places of our lady the Queen within the said forest, for all commonable cattle (except sheep and goats) levant and couchant in and upon the said tenement, and also a right of common of mast in the time of pannage in all the open and unenclosed wood and wood lands of our said lady the Queen in the said forest, for all hogs and pigs ringed levant and couchant in and upon the same tenement, as to the said tenement and lands belonging and appertaining.

In support of this claim, the counsel for the claimant called witnesses who proved to the satisfaction of the commissioners, that, for the full period of thirty years next before the making of the said claim, and upwards, and up to the said 28th of December, 1855, the claimant and his farmers and tenants of the said tenement and lands had actually taken and enjoyed, as claiming *right thereto, without interruption, [*62 the rights, profits, and benefits mentioned in the aforesaid claim.

The counsel for the commissioner in charge of the forest objecting on behalf of the Crown, on cross-examination of the witnesses, proposed to show that the said tenement, consisting of twenty-five acres as aforesaid, was previous and up to the year 1810 unenclosed waste land, parcel of the wastes of the manor of Langley, then belonging to Sir Charles Mill, Bart., the immediate predecessor of the claimant, and that the said wastes (with other wastes) were enclosed under the provisions of a local act of parliament passed in the year 1810;(a) and that the said twenty-five acres of land were allotted by the enclosure commissioners to the said Sir Charles Mill in fee-simple, and were about forty years ago enclosed by him under the provisions of the said local act; and that the enjoyment of the said rights, profits, and benefits had commenced subsequently to such enclosure, and since the year 1810: and it was contended on behalf of the Crown, that, inasmuch as the rights, profits, and benefits had been first taken and enjoyed since 1810, the claim set up under Lord Tenterden's Act, 2 & 8 W. 4, c. 71, was in point of law unsustainable, by reason of the provisions of the statutes 1 Anne, c. 7, s. 5, and 9 & 10 W. 3, c. 36, s. 10.

The counsel for the claimant objected to the evidence the Crown proposed to adduce, on the ground that it was inadmissible and immaterial, and could not defeat or destroy the rights claimed; and that a good title to such rights had been established under the provisions contained in the Prescription Act, 2 & 8 W. 4, c. 71, s. 1.

The commissioners differed in opinion on the point of law thus brought before them; Mr. Commissioner Gale being of opinion, that, by the

(a) 50 G. 3, c. lxi., "An act for enclosing lands in the parishes of Eling and Fawley, in the county of Southampton."

*63] operation of the 2 & 3 W. 4, c. 71, s. 1, the claimant was entitled to the rights he claimed, and that the evidence offered by the Crown was not material; and Mr. Commissioner Barstow being of opinion that the claimant was not entitled by the operation of that statute, inasmuch as the evidence was material, if true,—which for the purposes of this case is admitted.

The opinion of the court was therefore requested upon the above point of law upon which the commissioners so differed, and judgment was to be entered accordingly.

Montague Smith (with whom was *W. Hodges*), for the claimant.(a)—The question turns upon the 1st section of the Prescription Act, 2 & 3 W. 4, c. 71, which, after reciting that, “whereas the expression ‘time immemorial, or time whereof the memory of man runneth not to the contrary,’ is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice,” for remedy thereof, enacts “that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, *64] or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty years*, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and, when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.” This is a right of common or profit à prendre over lands of a forest, which may have had by the common law a lawful origin in custom, grant, or prescription. That a right of common or of pannage may exist in a forest, there is abundant authority to show. But it will be said that a grant cannot be presumed in this case,

(a) The points marked for argument on the part of the claimant, were,—

“1. That, under the provisions of the Prescription Act, 2 & 3 W. 4, c. 71, the claimant is entitled to the right of common mentioned in the case as being claimed by him:

“2. That the evidence adduced on behalf of the Crown was inadmissible and immaterial:

“3. That the opinion expressed by Mr. Commissioner Gale is correct.”

because of the statutes 1 Anne, c. 7, s. 5, and 9 & 10 W. 3, c. 36, s. 10. [JERVIS, C. J.—I doubt whether by the common law this might be the subject of a grant. The lord of a manor cannot derogate from the rights of the commoners by granting a part of the common.] The statute limits the time required for enjoyment, but the origin of the right claimed must still be defined. A somewhat similar question arose upon the 1st section of the tithe prescription act, 2 & 3 W. 4, c. 100, in *Salkeld v. Johnson*, 2 C. B. 749 (E. C. L. R. vol. 52), and 2 Exch. 256.† The 1 Anne, stat. 1, c. 7, s. 5,—reciting that “whereas the necessary expenses of supporting the *crown, or the greatest part of them, were formerly defrayed by a land revenue, which hath from time to time [*65 been impaired and diminished by the grants of former kings and queens of this realm; so that Her Majesty’s land revenue at present can afford very little towards the support of her government; nevertheless, from time to time, upon the determination of the particular estates whereupon many reversions and remainders in the crown do now depend or expect, and by such lands, tenements, and hereditaments, as may hereafter descend, escheat, or otherwise accrue or come to Her Majesty, her heirs or successors, the land revenues of the crown in fines, rents, and other profits thereof, may hereafter be increased, and consequently the burthen upon the estates of the subjects of this realm may be eased and lessened in all future provisions to be made for the expenses of the civil government,”—to the end “that the land revenues of the crown may be preserved, improved, and increased for the best advantage thereof,” enacts “that all and every grant, lease, or other assurance which shall be made or granted by Her Majesty, her heirs or successors, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments (advowsons of churches and vicarages only excepted), within the kingdom of England, &c., or any of them, or any part thereof, now belonging or hereafter to belong to Her Majesty, her heirs or successors, or to any other person or persons in trust for Her Majesty, her heirs or successors, in possession, reversion, remainder, use, or expectancy, whether the same be or shall be in right of the crown of England, or as part of the principality of Wales, or of the duchy or county palatine of Lancaster, or otherwise however, to any person or persons, body politic or corporate whatsoever, whereby any estate or interest whatsoever, in law or equity, shall or may pass from Her Majesty, her heirs or successors, shall be utterly *void and of none effect, unless such grant, lease, or assurance [*66 be made for some term or estate not exceeding one-and-thirty years, or three lives, or for some term of years determinable upon one, two, or three lives; and unless such grant, lease, or assurance respectively be made to commence from the date or making thereof; and, if such grant, lease, or assurance be made to take effect in reversion or expectancy, that then the same, together with the estate or estates in possession of and in the premises therein contained do not exceed three lives or

the term of thirty-one years in the whole; and unless such grant, lease, or assurance respectively be so made that the tenant be liable to punishment for waste; and unless there be reserved upon every such grant, lease, or assurance respectively the ancient or most usual rent, or more, or such rent as hath been reserved, yielded, and paid for such of the said manors, messuages, lands, tenements, rents, tithes, or other hereditaments as shall be therein contained, for the greater part of twenty years before the making thereof; and, where no such rent shall have been reserved or payable, that then upon every such grant, lease, or assurance, there be reserved a reasonable rent, not being under the third part of the clear yearly value of such of the said manors, messuages, lands, tenements, tithes, or other hereditaments as shall be contained in such lease or grant; and unless such respective rents be made payable to Her Majesty, her heirs or successors, who shall make such lease or grant, and to her or their heirs or successors, during the whole term or time of the continuance thereof respectively." One question will be, whether that provision would extend to a grant like this. [JERVIS, C. J.—The other statute is the stronger one.] The 10th section of the 9 & 10 W. 3, c. 36,(a) is *67] as follows:—"And, to the *end the said forest and premisses may be perpetually estated and preserved in the Crown for publick use as aforesaid, and may not be granted to any private use or benefit, be it further enacted, that, in case any person or persons whatsoever shall presume to take or shall obtain any gift, grant, estate, or interest, of or in the said inclosures or wasts, or any woods or trees growing thereon, every such gift, grant, estate, or interest, shall ipso facto be null and void, and the person or persons so taking or obtaining the same shall be and is hereby made and declared utterly disabled and incapable to have, hold, or enjoy any such gift, grant, estate, or interest, and shall also forfeit treble the value of any such gift or grant, to him or them which shall first sue for the same in any of His Majesty's courts of record, wherein no essoign or wager of law shall be allowed the defendant, and shall also be incapable of holding or enjoying any office or employment whatsoever." It cannot be contended that that section does not apply to a profit à prendre. The right claimed in this case, therefore, could not be claimed by grant. If, but for that statute, there might have been a valid grant, there can be no reason why the claimant should not have a title by prescription within the meaning of Lord Tenterden's act.

W. H. Willes (with whom were the *Attorney* and *Solicitor-General*), *contrà*.(b)—The right in question is claimed in respect of twenty-five

(a) In the Statutes of the Realm called "9 Gul. 3, c. 33," "An act for the increase and preservation of timber in the New Forest, in the county of Southampton."

(b) The points marked for argument on the part of the objector, were,—

"1. That the claimant could not by virtue of the 2 & 3 W. 4, c. 71, acquire the rights claimed by him:

"2. That the evidence showing the period at which the rights claimed were first enjoyed, was material."

acres of land enclosed under an act of parliament in the year 1810. The answer is, that the enjoyment of that right commenced subsequently to the year 1810. The very foundation of *prescription is, the presumption of a grant: it is essential to its existence that it might have had a legal origin. In 2 Bl. Com. 83, it is said: "Common *appendant* is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the said manor. Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable; as, hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity, like common *appendant*, is therefore not of general right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for the purpose." It is admitted, that, but for Lord Tenterden's act, the thirty years' enjoyment would have conferred no right. The first section of that act enacts that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common, &c., where such right shall have been enjoyed for thirty years, shall be defeated or destroyed by showing *only* that such right was first enjoyed at any time prior to such period of thirty years. That does not preclude a party from showing that the enjoyment commenced at a time when it could not legally have originated,—that it was illegal in its inception. In *The Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102, 108, Lord Mansfield says: "In the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there *could* be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription." Assuming, then, as Parke, B., does in *Bright v. Walker*, 1 C. M. & R. 211,† that Lord Tenterden's act creates a new time of legal memory, it is plain that the prescription may be defeated by showing, that, at the time of the commencement of the enjoyment, it could have had no legal origin. *Goodtitle d. Parker v. Baldwin*, 11 East, 488, is a strong authority to show that there can be no presumption in favour of the acquisition of such a right as this, against the express prohibition of a statute. The intention of the legislature is apparent, that, after the passing of the 9 & 10 W. 3, c. 36, the New Forest should be preserved to the public, and that no subject should acquire any interest therein by grant. [JERVIS, C. J.—The statute of W. 3 in effect says that no right of common shall be created over the New Forest. Lord Tenterden's act clearly was not intended to repeal that, and to permit such a right to be acquired by thirty years' enjoyment.] This is what the court are invited to do.

M. Smith, in reply.—There is no repugnancy in presuming that this right might have had a legal origin. The object of Lord Tenterden's act was, to get rid of all presumptions; and its utility will be much impaired by the adoption of the narrow construction contended for on the other side.

JERVIS, C. J.—I am of opinion that our judgment in this case must be against the claimant,—that the evidence offered on the part of the Crown was admissible, and that the right in question was not acquired under the 2 & 3 W. 4, c. 71, s. 1. I entertain considerable doubt whether, it appearing that the enclosure of the twenty-five acres in question took place since the time of W. 8, Lord Tenterden's act could apply at all, inasmuch as to hold that it does apply would be repealing by general words an express and positive enactment that there shall be *70] no such grant. It is, however, unnecessary to give any opinion upon that matter, because I am of opinion, that, assuming that Lord Tenterden's act does apply, still the claim cannot be supported. It is not sought to be defeated or destroyed by showing *only* that the right, profit, or benefit was first taken or enjoyed at any time prior to the period of thirty years; but by showing that it never had any legal existence. I do not stop to inquire whether or not there could be a right of common as appurtenant to common. If it could exist in point of law, it is untrue in point of fact to say that the right existed prior to 1810, because there was no allotment until after that date. We must, therefore, take it that the enjoyment of the right claimed commenced after the year 1810. Here, then, we have a common enclosed, which could not carry common. There could therefore be no prescription. Nor could there be any grant, seeing that the Crown is by the statute incapacitated from making a grant. The effect of the argument on the part of the claimant, is, that you are to get indirectly from the Crown, through the laches of its officers, that which the Crown itself could not confer directly. I am clearly of opinion that Lord Tenterden's act does not give the claimant the right he claims.

CRESSWELL, J.—I am entirely of the same opinion. It seems to be imagined by Mr. *Smith*, that, because you cannot defeat a claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit a prendre, by showing *only* that such right or profit was first taken or enjoyed at any time prior to the period of thirty years, therefore you cannot defeat it at all. I do not find that stated in Lord Tenterden's act. There is no attempt in this case to defeat the claim by showing only its origin, but by showing that it never could have had a legal origin.

*71] *CROWDER, J.—I incline to think with the Lord Chief Justice that the provision in the 9 & 10 W. 3, c. 36, s. 10, is such that Lord Tenterden's act could not apply to this case. But I do not wish to be understood as deciding the question upon that view; though it

seems to me that it would be a pretty strong construction of the latter statute to hold it to operate a repeal of the former. But it appears to me that what was offered in evidence here, was, not *only* for the purpose of showing the commencement of the enjoyment of the right claimed, but for the purpose of showing that, and also showing that the tenement as appurtenant to which the right was claimed only had existence as it now exists forty years ago. I think the evidence offered was sufficient to defeat the right, and consequently that Lord Tenterden's act does not apply.

WILLES, J.—I am of the same opinion. What was done here was in fact this,—it was shown that the enjoyment commenced in 1810, so that it could not give rise to the right claimed, and that it was impossible that any legal grant of the right could have existed.

Judgment for the objector.

*HILL v. MOUNT. May 6.

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By an agreement between A. and B., it was agreed that A. should do all acts necessary (except the advance of money) for the purpose of procuring and perfecting certain letters patent, and should immediately after the same were procured execute an assignment of one-third share therein to B.: and B. agreed to pay all fees and disbursements that might be necessary for procuring the letters patent, enrolling the specification, and otherwise in perfecting the same.

By the 16 & 17 Vict. c. 5, s. 2, it is enacted that all letters patent shall be made subject to the condition that the same shall be void, and the privileges thereby granted shall cease and determine, at the end of three years and seven years respectively, unless there be paid before the expiration of the said three and seven years respectively two several sums of 50*l.* and 100*l.* as therein mentioned:—

Held, that the execution of an assignment by A. was the whole consideration for the undertaking of B. to pay the sums mentioned in that section; and, consequently, a condition precedent to his right to sue B. for the non-payment thereof.

THE first count of the declaration stated, that a certain agreement in writing was made and entered into by and between the plaintiff and defendant, which agreement was in the words and figures following, that is to say: "Memorandum of agreement made the 8th of October, 1852, between Christopher Hill, of New Swindon, in the county of Wilts, railway superintendent, of the one part, and Francis William Mount, of No. 10, Clements Lane, Lombard Street, in the city of London, gentleman, of the other part: Whereas the said Christopher Hill has lately invented certain improvements in the manufacturing of lubricating matters, and has applied to the said Francis William Mount to assist him, as well in securing the benefit of the said invention by means of letters patent, or grants in the nature thereof, for Great Britain and foreign kingdoms and republics, as in making the said invention known, and in bringing the same to a profitable result, which he the said Francis William Mount hath consented and agreed to do upon and subject to the terms and

stipulations hereinafter contained: It is, therefore, agreed and declared between the parties hereto in manner following, that is to say, that the said Christopher Hill shall and will do all necessary acts, matters, and things, excepting the advance of money, as inventor, for the purpose of *73] procuring, *securing*, and *perfecting*, letters patent, and *grants in the nature thereof, for Great Britain and foreign parts as aforesaid, and shall, immediately after the same are procured, make and execute to the said Francis William Mount, or his nominee, a full and effectual assignment and assurance of and in one undivided third part or share of and in the said letters patent, or grants in the nature thereof, and of and in all the benefit and advantage to be derived from the same: That the said Francis William Mount shall and will, out of his moneys, bear, pay, and discharge all fees and disbursements that may be necessary for procuring the said letters patent, or grants in the nature thereof, and of enrolling the specification, and otherwise in *perfecting* the same; and shall and will give his time, and use his best exertions, separately and conjointly with the said Christopher Hill, in making the invention known, and generally in bringing the same to a profitable result: That all sums of money, except for the purposes aforesaid, that may be advanced by the said Francis William Mount in reference to the said invention, shall be repaid or retained by him out of the first returns and produce of the said invention, and before any division be made in respect thereof: That it shall be optional on the part of the said Francis William Mount whether or not he will bear or pay the expense of any foreign patent, or grants in the nature thereof; and, in the event of his neglecting or omitting for the space of fourteen days after being required by the said Christopher Hill by notice in writing so to do, he shall in respect of such country forfeit all right to the said invention, and the said Christopher Hill shall be in all respects at liberty to proceed therein as if this agreement had not been made: That the said Francis William Mount shall transact all necessary business in England as solicitor in reference to the said invention, in negotiating the sale *74] *thereof, or in granting any license or licenses thereunder, without making any charge against the said Christopher Hill for the same, beyond his actual outlay: That, in the event of the said Christopher Hill refusing or neglecting to do all and every necessary act as inventor for perfecting any patent or patents or grants, he shall forfeit the sum of 50*l.* in each and every case: That neither of the parties shall sell or dispose of his interest, or enter into any contract or agreement for the sale of his interest in any patent relative to the said invention, without giving the other of them the option of purchasing the same, and allowing ten days for the exercise of such option; nor grant or enter into any contract or agreement to grant license or licenses for the use of the same, without the knowledge and consent of the other of them: That the said Christopher Hill shall and will execute to the said Francis

William Mount, his executors or administrators or assigns, upon any reasonable request, such further or other assurance or assignment for more effectually assuring or assigning the said one-third share of and in the said invention and any letters patent for the same." Averment, that the said Christopher Hill in the said agreement mentioned is the plaintiff, and the said Francis William Mount in the said agreement mentioned is the defendant; that, after the making of the said agreement, and before the commencement of this suit, it was necessary to pay a certain sum of money, to wit, the sum of 50*l.*, for the *procuring and perfecting* the said letters patent in and for Great Britain,—of which the defendant then had notice; that, before the commencement of this suit, the plaintiff had done and performed all things on his part to be done and performed to entitle him to sue in this action the defendant upon his said agreement, for not paying the said sum of money in pursuance of the said *agreement, and the plaintiff had always been [*75 ready and willing to do all things which it was necessary he should be ready and willing to do to entitle him to sue the defendant in this action for the non-payment of the said sum of money in accordance with his said agreement; yet that the defendant did not, although a reasonable time for that purpose had elapsed before the commencement of this suit, bear, pay, or discharge the said sum of money in pursuance of his said agreement, at the said time when he agreed to pay it by the said agreement, or at any other time, but always wholly neglected and refused so to do; whereby the plaintiff was put to much trouble, inconvenience, and expense, in raising money to pay the said sum of money which the defendant ought to have paid as aforesaid, and the plaintiff was himself obliged to pay and did pay the said sum of 50*l.*

The defendant pleaded,—first, as to the first count, that the agreement in that count mentioned was made after the passing and coming into operation of The Patent Law Amendment Act, 1852 [15 & 16 Vict. c. 83], and that, after the making of the said agreement, and after the passing and coming into operation of a statute passed in the sixteenth year of the reign of our Lady the now Queen, intituled "an act to substitute stamp-duties for fees on passing letters patent for inventions, and to provide for the public use of certain indexes of specifications [16 & 17 Vict. c. 5]", the plaintiff procured letters patent in respect of the said invention for Great Britain and Ireland, and the same were duly granted to him; and that the money which the plaintiff in the said first count charged the defendant with neglecting and refusing to pay, was money required for the payment of the 50*l.* which by the provisions of the said statute passed in the sixteenth year of the reign of our Lady the now Queen is made payable before the *expiration of the third [*76 year from the date of the letters patent, as and for stamp-duty, and not otherwise; and that, save as aforesaid, it was not necessary to pay such money, or any part thereof; and so the defendant said that it

was not necessary to pay such money, or any part thereof, for *procuring* or *perfecting* the said letters patent, within the true intent and meaning of the said agreement.

Secondly. As to the said first count, that the agreement therein mentioned was made after the passing and coming into operation of The Patent Law Amendment Act, 1852; and that, after the making of the said agreement, and after the passing and coming into operation of the said statute passed in the sixteenth year of the reign of our Lady the now Queen in the first plea mentioned, the plaintiff procured letters patent in respect of the said invention for Great Britain and Ireland, and the same were duly granted to him; and that the money mentioned in the first count was money required for the purpose mentioned in the first plea, and not otherwise; and that, after the plaintiff had so procured the letters patent, and before the said money mentioned in the first count became due and payable, the defendant tendered to the plaintiff for execution a due and proper assignment by the plaintiff to the defendant of one undivided third part or share of and in the said letters patent, and then required the plaintiff to execute the same; yet that the plaintiff did not nor would then or at any other time execute the same, but wholly refused so to do, whereupon the defendant refused to pay the money in the first count mentioned.

Demurrer to the second plea, on the ground, "that the execution by the plaintiff of the assignment in second plea referred to, is not a condition precedent to the maintenance of the action, so far as the first count is concerned. Joinder.

*77] *R. E. Turner*, in support of the demurrer.(a)—The undertaking of the defendant was, to pay all fees and disbursements that might be necessary for the procuring the letters patent, and enrolling the specification, and otherwise perfecting the same. Now, the letters patent could not be said to be *perfected* until the stamp-duties pursuant to the 16 & 17 Vict. c. 5, were paid. The 2d section of that statute enacts that "all letters patent for inventions to be granted under the provisions of the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83 (except in the cases provided for in the 4th section of this act), shall be made subject to the condition that the same shall be void, and that the powers and privileges thereby granted shall cease and determine, at the end of three years and seven years respectively from the date thereof, unless there be paid before the expiration of the said three years and seven years respectively the stamp-duties in the schedule to this act annexed expressed to be payable before the expiration of the third year and of the seventh year respectively; and such letters patent, or a duplicate thereof, shall be stamped with proper stamps showing the payment of

(a) The point marked for argument on the part of the plaintiff was,—

"That the second plea is bad, as the execution by the plaintiff of the assignment in the second plea referred to, is not a condition precedent to the maintenance of this action, so far as the first count is concerned."

such respective stamp-duties, and shall, when stamped, be produced before the expiration of such three years and seven years respectively at the office of the commissioners; and a certificate of the production of such letters patent or duplicate so stamped, specifying the date of such production, shall be endorsed by the clerk of the commissioners on the letters patent or duplicate, and a like certificate shall be endorsed upon the warrant for such letters patent filed in the said office." Until payment of those duties,—50*l.* *before the expiration of the third year, and 100*l.* before the expiration of the seventh year,—the [*78 letters patent cannot be said to be perfected. [JERVIS, C. J.—Could not the patentee sue for an infringement of the patent before the expiration of the third and seventh years? The three years and seven years were given in case of the grantee of the letters patent; to relieve him from the heavy payments before required, in the event of the patent turning out to be bad or unprofitable. Suppose a party were proceeding by *scire facias* to repeal the patent, must he pay the 50*l.* and the 100*l.* in order to enable him to produce the letters patent in evidence? Surely that cannot be so.] However that may be, here is an express agreement between the parties that everything shall be done on the defendant's part to make the letters patent perfect. They cannot be perfect whilst something remains to be done to make them available for the whole period for which they are granted. It may be that the defendant is not bound to pay the 50*l.* and the 100*l.* respectively until the expiration of the third and seventh years; but he cannot fulfil his contract without doing so. The declaration avers that it became necessary to pay the 50*l.* for the procuring and perfecting the letters patent. After the lapse of the times mentioned, the patent becomes void unless the moneys are paid. Then, the refusal of the plaintiff to assign does not go to the whole consideration: the execution of an assignment, therefore, was not a condition precedent to the maintenance of an action upon the agreement. The case comes within the 8*d* rule in the notes to *Pordage v. Cole*, 1 Wms. Saund. 820 c,—“Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. As, *where A. [*79 by deed conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted, that, A. well and truly performing all and everything therein contained on his part to be performed, he would pay the annuity: in an action by A. against B. on this covenant, the breach assigned was, the non-payment of the annuity: plea, that A. was not at the time *legally possessed of the negroes*

on the plantation, and so had not a good title to convey. The Court of King's Bench on demurrer held the plea to be ill, and added, that, if such plea were allowed, any one negro not being the property of A. would bar the action: *Boon v. Eyre*, 1 H. Blac. 273, n. (a), 2 Sir W. Blac. 1312. The *whole* consideration of the covenant on the part of B., the purchaser, to pay the money, was, the conveyance by A., the seller, to him of the *equity of redemption* of the plantation, and also the *stock of negroes* upon it. The excuse for non-payment of the money, was, that A. had broken his covenant as to *part* of the consideration, namely, the stock of negroes. But, as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes: Per Ashhurst, J., *Campbell v. Jones*, 6 T. R. 573."

*80] *Honyman*, contrà.(a)—The declaration states that the *defendant agreed to pay all fees and disbursements that might be necessary for procuring the letters patent and enrolling the specification, and otherwise in perfecting the same; and assigns for breach the non-payment of a sum of 50*l.* which it was necessary to pay for the procuring and perfecting the letters patent. The first plea alleges that the money which the defendant neglected to pay was money made payable by the 15 & 16 Vict. c. 83, before the end of the third year from the date of the letters patent, as and for stamp-duty, and that it was not necessary to pay such money for procuring or perfecting the said letters patent within the meaning of the agreement. The second plea reiterates all those statements, and further states, that, after the plaintiff had procured the letters patent, and before the said money was due and payable, the defendant tendered to the plaintiff for execution a due and proper assignment of one third share in the letters patent, and required the plaintiff to execute the same, but that the plaintiff refused to do so. It is said, that, in order to render the letters patent perfect, it was necessary that all the stamp-duty should have been paid. But it is admitted that the non-payment of the stamp-duties at the end of the third and seventh years respectively, does not render the patent void so as to prevent an action being brought in the interim for an infringement. [CRESSWELL, J.—Suppose an infringement in the seventh year, and the grantee failed to pay the duty payable at the end of that year,—could he still sue for the infringement?] It is submitted that he might, just as he might sue after the expiration of the fourteen years for an infringement which

(a) The points marked for argument on the part of the defendant, were,—

"1. That the assignment by the plaintiff to the defendant of the one-third of the patent is a condition precedent to the plaintiff's right to call for the payment of the moneys alleged in the first count to be unpaid:

"2. That the plaintiff having absolutely refused to assign the third of the patent to the defendant, notwithstanding the tender of the assignment to him for execution, had no right to call on the defendant to pay any further moneys towards perfecting the patent."

took place during the *currency of the term.(a) The further facts alleged in the second plea furnish a complete answer to the action. [*81 That the letters patent were procured, and an assignment tendered to the plaintiff for execution, are facts admitted by the demurrer. Whether that which is to be done on the one side is a condition precedent to something to be performed on the other, is to be determined in all cases by the intention of the parties. In 1 Wms. Saund. 320 *b*, it is said—"It is justly observed, that covenants, &c., are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention: *Hotham v. The East India Company*, 1 T. R. 645; *Porter v. Sheppard*, 6 T. R. 668; *Campbell v. Jones*, 6 T. R. 571; *Morton v. Lamb*, 7 T. R. 130. In order, therefore, to discover that intention, and thereby to learn with some degree of certainty when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act: *Dyer*, 76 *a*, in margin; *Thorpe v. Thorpe*, 1 Salk. 171, 1 Lord Raym. 665, 1 Lutw. 250, 12 Mod. 461; *Peters v. Opie*, 1 Vent. 177, 2 Saund. 350, per Hale, C. J.; *Callonel v. *Briggs*, 1 Salk. 113; *Terry v. Duntze*, 2 H. Blac. 389; *Campbell v. Jones*, 6 T. R. 572." That which the plaintiff had to do [*82 here was, to execute an assignment of the one-third share in the letters patent immediately: that which the defendant was to do, viz., to pay the money, was not to be done until the expiration of three years and seven years respectively. The defendant could not be bound to go on making the payments, the plaintiff refusing to give him any part of the consideration for the covenant: *Withers v. Reynolds*, 2 B. & Ad. 882 (E. C. L. R. vol. 22).

Turner, in reply.—The payment of the stamp-duties clearly was necessary to the perfecting the letters patent. They could not be said to be perfect for the purpose of this agreement, unless perfect for the whole term of fourteen years.

JERVIS, C. J.—I am of opinion that our judgment in this case ought to be for the defendant. It is unnecessary to determine whether the 50*l.* was payable by the defendant at all or not, or whether it was a sum

(a) In that case, the *whole* amount of duty would have been paid: not so, in the case put by the learned judge.

the payment of which was necessary to "perfect" the letters patent, because I think that the execution of the assignment by the plaintiff was a condition precedent to his right to insist upon the payment being made, and that, the assignment not having been executed, the payment of the 50*l.* could not be enforced. The agreement on which the action is brought provides, that the plaintiff shall do all necessary acts, matters, and things, except the advance of money, as inventor, for the purpose of procuring, securing, and perfecting the letters patent, and shall, immediately after the same are procured, make and execute to the defendant or his nominee an assignment of one third share in the said letters patent; and that the defendant shall pay all fees and disburse-
 *83] ments that might be necessary for *procuring* the letters *patent, enrolling the specification, and otherwise in *perfecting* the same. The plea shows that the patent has been obtained, and that the plaintiff, although an assignment was tendered to him for execution, refused to execute it. I think the execution of the assignment was a condition precedent. Mr. *Turner*. contends that the execution of the assignment was not the whole consideration for the defendant's undertaking to pay the money. But I apprehend it was. He says that the procuring the patent and the enrolment of the specification formed part of the consideration. That, however, is not so. It is no more part of the consideration than the building of a carriage ordered by me would be part of the consideration for the payment of the price. The *building* of the carriage, though necessary to the performance of the contract on the part of the coach-builder, is not the consideration: the consideration for the payment of the price by me, is, my *receipt* of the carriage.

GRESSWELL, J.—I am of the same opinion. It appears upon these pleadings that the whole consideration for the payment of the money by the defendant, was, the assignment to him by the plaintiff of one third share in the letters patent. The assignment was to be made immediately the letters patent were obtained. The 50*l.* was not to be paid until the expiration of three years after the letters patent had been granted. There has, therefore, been a failure on the plaintiff's part to perform a condition precedent. In the absence of an assignment, the defendant clearly was not called upon to pay the money.

CROWDER, J.—I am of the same opinion. I cannot for a moment doubt that the only consideration for the payments by the defendant,
 *84] was, the assignment of a *third share of the patent. There is no ground whatever for saying that that which was necessary to be done by the plaintiff for the purpose of procuring the letters patent, formed any part of the consideration. The only consideration moving from the plaintiff to the defendant, was, the execution of the assignment. That being a condition precedent, and not having been performed, I think the plaintiff is not in a situation to maintain this action.

WILLES, J.—I also am of opinion that the assignment of the share in

the letters patent was to precede the payment by the defendant of the 50l., and that it was the entire consideration for it.

Judgment for the defendant.

LAWSON v. THE BANK OF LONDON. April 22.

A declaration stated that the plaintiff had established a bank in London called "The Bank of London," and was the first person who had established a bank by or under that name, and had established the said bank at great expense, and caused the name to be published and affixed on the offices of the said bank, so that the same might be seen and known by the public, and had caused prospectuses of the said bank to be printed and circulated with the said name and title of "The Bank of London" thereon, and the said bank was then commonly known by the name of, and was the only bank named or styled "The Bank of London;" whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to allege that the defendants, intending to injure the plaintiff in his said bank, and the said business of his said bank, afterwards, and while his said bank was the only bank named or styled "The Bank of London," wrongfully and fraudulently established a certain other bank in London under the name, style, and title of "The Bank of London," in imitation of, and as representing, the said Bank of London of the plaintiff, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false colour and pretence that the same was the bank established by the plaintiff; and that thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him, so fully and extensively as he would otherwise have done, and had been deprived of profits, and that by means of the premises divers persons were induced to believe and did believe that the bank so established by the defendants was the bank called "The Bank of London" established by the plaintiff:—

Held, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker.

Whether an action of this description will lie against a (trading) corporation,—*quære?*
Scmble (per Willes, J.), that it will.

THE declaration stated, that the plaintiff, before commencement of this suit, had established a certain bank *in the city of London, [85 called "The Bank of London," and the plaintiff was the first person who had established a bank by or under that name, and had himself proposed and given the said name for and to the said bank; and had established the said bank at great expense, and had caused the said name, "The Bank of London," to be published and affixed on the offices of the said bank, so that the same might be seen and known by the public, and had caused prospectuses of the said bank to be printed, published, and circulated among the public with the said name and title of "The Bank of London" upon the said prospectuses; and the said bank was then commonly known by the name of "The Bank of London," and was the only bank named or styled The Bank of London; whereby the plaintiff, before and at the time of the committing of the grievances by the defendants thereafter mentioned, had acquired and was acquiring great gains and profits: yet the defendants (who were sued as aforesaid by the name of "The Bank of London"), well knowing the premises, but intending to injure the plaintiff in his said bank, and the said business of his said bank, afterwards, and while his said bank was the only bank named or styled "The Bank of London," wrongfully, inju-

riously, deceitfully, and fraudulently, against the will and without the license or consent of the plaintiff, established a certain other bank in the said city of London, under the name, style, and title of "The Bank of London," in imitation of, and as representing, the said Bank of London of the plaintiff; and then wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false colour and pretence that the same was the bank so established by the plaintiff as aforesaid: By reason of which premises the plaintiff had been hindered and prevented from carrying on his business at the said bank so established *by him so fully and
 *86] extensively as he would otherwise have carried it on, and had been deprived of divers gains and profits which otherwise would have accrued to him by reason of the said business of his said bank; and also by means of the premises divers persons had been and were induced to believe and did believe that the said bank so established by the defendants as aforesaid was and is the said bank called the Bank of London so established by the plaintiff as aforesaid, whereby the plaintiff had been much damaged and injured in his said business and otherwise: And the plaintiff claimed 500*l*.

The defendant demurred to the declaration, the ground stated in the margin being, "that a corporation cannot be sued for such a cause of action as is stated in the declaration."

R. E. Turner, in support of the demurrer.(a)—The declaration is bad. The defendants, being a body corporate, must have been so created either by act of parliament or by charter; and the corporate name, which is the essence of a corporation, must have been given to it by the power which called it into existence. "The name of the corporation is as the name of baptism:" *Vin. Abr. Corporations*, (E), pl. 2, citing The
 *87] Case of *Sutton's Hospital*, 10 Co. Rep. 28 b, and the Year Book, 21 E. 4, fo. 56 a, b. So, in *Com. Dig. Franchises*, (F. 9), it is said, "A corporation ought to have a name, which is in the nature of a name given to a natural person by baptism." Having thus got its name, the corporation cannot of its own free will change it. [CRESSWELL, J.—Would an individual be liable for that which is charged here?] Possibly he might, by analogy to the cases of counterfeiting trade-marks: *Blofield v. Payne*, 4 B. & Ad. 410 (E. C. L. R. vol. 24), 1 N. & M. 353 (E. C. L. R. vol. 28); *Sykes v. Sykes*, 5 D. & R. 292 (E. C. L. R. vol. 16), 3 B. & C. 541 (E. C. L. R. vol. 10); *Crawshay v. Thompson*, 4 M.

(a) The points marked for argument on the part of the defendants were as follows:—

"That a corporate body is not liable to be sued upon such a cause of action as is stated in this declaration: that the defendants must have been constituted a corporate body by the name of the Bank of London, either by the Crown or under the provisions of an act of parliament, and that an action will not lie against them for using a name so created: that the action should, if it lies at all, have been brought against the individuals who caused the company to be constituted under the name of The Bank of London: and that, supposing the action to lie against the defendants, the declaration does not show any right of action in the plaintiff, or any legal wrong or damage done to him."

& G. 857 (E. C. L. R. vol. 48), 5 Scott N. R. 562. [JERVIS, C. J.—In those cases, the articles which the defendants were charged with having imitated, had acquired a reputation, and were known by distinctive appellations; and the complaint was, that the plaintiffs had lost custom by the substitution of the spurious articles. It is not so here: there is no loss of custom alleged in this declaration. CRESSWELL, J.—This declaration does not state that the plaintiff had ever transacted any business at his bank.] In *The Queen v. The Registrar of Joint Stock Companies, in re The Sheffield and Rotherham and Chesterfield Fire and Life Insurance Company*, 10 Q. B. 839 (E. C. L. R. vol. 59), a joint stock company having without authority changed its name, the registrar of joint stock companies refused to receive a return made in the new name: and, upon a rule for a mandamus to compel him to do so, Lord Denman, delivering the judgment of the court, said,—“It appears to us, that, after a company has been completely registered, without defect or omission, so as to *be incorporated* by the name set forth in the deed of settlement, such incorporated company has not the power to change its name. The identity of name is the principal means for effecting that perpetuity of succession with members frequently changing, which is an important purpose of incorporation: 2 Bac. *Abr. [*88 255, tit. *Corporations*, (C), 1, 7th edit. And, though the King, by his prerogative, might incorporate by the new name, and the newly-named corporation might retain former rights, and sometimes its former name also,—*The Queen v. The Bailiffs of Ipswich*, 2 Lord Raym. 1239; *Mellor v. Spateman*, 1 Saund. 339, 344; and *Mellor v. Walker*, 2 Saund. 1, 2,—it never appears to be such an act as the corporation could do for itself, but required the same power as created a corporation. The statute 7 & 8 Vict. c. 110, does not express any intention of changing this general principle; but, by s. 25, incorporates the company by the name set forth in the deed, and declares that it shall continue so incorporated until it shall be dissolved. The same section expressly authorizes a change of seal from time to time, but does not mention any change of name.” [CRESSWELL, J.—What sort of a corporation is this?] A banking copartnership established by letters patent under the 7 G. 4, c. 46. Assuming that the defendants could be sued at all, they clearly cannot as a corporation be liable in an action like the present. A corporation cannot commit treason or felony,—Com. Dig. *Franchises*, (F. 14),—or be sued for any fraud or any act of the mind. In *The Queen v. The Great North of England Railway Company*, 9 Q. B. 315, 326 (E. C. L. R. vol. 58), Lord Denman says: “Some dicta occur in old cases, ‘a corporation cannot be guilty of treason or of felony.’ It might be added, ‘of perjury, or offences against the person.’ The Court of Common Pleas lately held that a corporation might be sued in trespass: *Maund v. The Monmouthshire Canal Company*, 4 M. & G. 452 (E. C. L. R. vol. 43), 5 Scott, N. R. 457: but nobody has sought to fix them

with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, *89] as such, has no such duties, cannot be guilty in *these cases." In *Stevens v. The Midland Counties Railway Company*, 10 Exch. 352,† an action was brought against a railway company for having maliciously, and without reasonable or probable cause, prosecuted the plaintiff on a charge of having feloniously received a piece of tarpauling, the property of the company; and Alderson, B., said: "It seems to me that an action of this description does not lie against a corporation aggregate; for, in order to support the action, it must be shown that the defendant *was actuated by a motive in his mind*; and a corporation has no mind."(a) Then, assuming that an action of this sort could be maintained against a corporation, the plaintiff is not the proper person to sue. If any one is damnified by the act of the defendants, it is "The Bank of London," not the promoter. [JERVIS, C. J.—The plaintiff establishes a bank, which he calls The Bank of London: it is not a corporation, or *he* could not sue in his own name. The defendants establish a bank, which they also call the Bank of London, and which *is* a corporation, or the parties could not be sued in that name. It is a strange state of things.] The declaration discloses no legal damage to the plaintiff: the supposed cause of action is, that the defendants have established themselves as a bank by and under a name in which the plaintiff intended to carry on the business of banking.

Macnamara, contrā.—The matter substantially complained of in this declaration, is, that the defendants transacted their business fraudulently, and represented that their bank was the bank which had been established by the plaintiff. In order to maintain the action, the plaintiff would be *90] bound to show that the defendants *had either directly or indirectly represented their bank to be the bank previously established by the plaintiff. If so, the action is clearly one that would lie against an individual; and there can be no good reason why it should not also lie against a corporation. There are numerous cases of actions for fraudulently representing an article to be the same as that dealt in by the plaintiff, for the purpose of passing it off for the plaintiff's, and so interfering with the plaintiff's trade. The most recent case of that sort at common law, is that of *Rodgers v. Nowill*, 5 C. B. 109 (E. C. L. R. vol. 57), where it was held, that an action upon the case may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff,—where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the

(a) In the report in the *Law Journal*, Vol. 23, Exch. 328, the passage stands thus,—“for, an action for a malicious prosecution cannot be sustained against a corporation, as such an action requires the existence of malice, and a corporation cannot have malice.”

defendant's goods to be of the plaintiff's manufacture,—and the defendant uses such mark with intent to deceive,—and sells the goods so marked as and for goods of the plaintiff's manufacture; and that proof of special damage is not necessary; and that, in such a case, it is enough,—at least after verdict,—to allege generally, that, by means of the premises, the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom. The most recent case in Chancery, is, *Farina v. Silverlock*, 24 Law Journ. Ch. 632, 1 Kay & Johnson, 509,(a) [*91] where it was held that the Court of Chancery will restrain the imitation, for the purposes of sale, of a trade-mark, where such imitation may be used for fraudulent purposes, notwithstanding that there may be no proof of any actual injury suffered by the plaintiff. The next question is, whether an action of this sort will lie against a corporation. There can be no reason why at this day it should not. This is a trading corporation; and the fraud charged is one of a commercial character. It is an act committed by the company in its corporate character, and for the benefit of the company. The strict rule which formerly prevailed as to acts which might or might not be done by a corporation, has of late years been very considerably relaxed. The uniform tendency of recent decisions has been, to place trading corporations upon the same footing as ordinary partnerships. Thus, railway companies are held responsible for nonfeasance as well as for misfeasance, for acts of omission and of commission, and even for trespasses: the old law being now held to apply,—and even that in a very modified manner,—to municipal corporations only. The case of *Stevens v. The Midland Counties Railway Company*, 10 Exch. 352,† is very distinguishable from the present: but the point suggested was not decided there; the real ground of the decision being, that there was no evidence that the prosecution was instituted by the company, or that the act of instituting it was assented to or ratified by them. Then it is said that the plaintiff is not the proper person to sue in this case. He appears, however, upon the face of the declaration, to be the only person interested in the Bank of London alleged to have *been established by him. [CRESSWELL, [*92] J.—The declaration nowhere alleges that he carried on the business of a banker.] If it appears that the plaintiff established the Bank of London for the purpose of carrying on the business of banking, and he sustains injury through the wrongful act of the defendants in trading

(a) And see *Knott v. Morgan*, 2 Keen, 213, *Motley v. Downman*, 3 Mylne & Cr. 1, *Millington v. Fox*, 3 Mylne & Cr. 338, *Spottiswoode v. Clarke*, 2 Phill. Ch. R. 154, *Perry v. Truefitt*, 6 Beavan, 66, *Croft v. Day*, 7 Beavan, 84, *Clarke v. Freeman*, 11 Beavan, 112, *Purse v. Brain*, 17 Law Journ. Ch. 141, *Pidding v. Howe*, 8 Simons, 477, *Franks v. Weaver*, 10 Beavan, 297, *Holloway v. Holloway*, 13 Beavan, 209, *Morison v. Moat*, 9 Hare, 241, *Flavel v. Harrison*, 10 Hare, 467, *Shrimpton v. Laight*, 18 Beavan, 164.

See also the American cases of *Amoskeog Manufacturing Company v. Spear*, 2 Sandf. Sup. Ct. 599, *Coats v. Holbrook*, 2 Sandf. Ch. R. 586, *Taylor v. Carpenter*, 2 Sandf. Ch. R. 603, *Partridge v. Menck*, 2 Sandf. Ch. R. 622, *Taylor v. Carpenter*, 11 Paige, R. 293, 2 Woodbury & Minot, 1.

under the same name, in the manner and for the fraudulent purpose alleged in the declaration, the plaintiff, it is submitted, shows a sufficient title in the name to enable him to maintain the action. [JERVIS, C. J.—The true state of facts is tolerably plain. There are two promoters in the market, each endeavouring to establish a bank to be called “The Bank of London.” The defeated promoter brings his action, not against the other promoter, who has beaten him in the race, but against *the incorporated bank*, which, for anything that appears, had nothing whatever to do with the alleged fraud.] The allegation is, that the defendants wrongfully and fraudulently established their bank under the name, style, and title of the Bank of London, in imitation of, and as representing the said Bank of London of the plaintiff, and then wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and *under the false colour and pretence that the same was the bank so established by the plaintiff as aforesaid.*” Surely that sufficiently discloses a fraudulent invasion of the plaintiff’s right. [JERVIS, C. J.—It is a very singularly drawn declaration. CRESSWELL, J.—What is the meaning of “and as representing the said Bank of London of the plaintiff?”] Though not quite accurately expressed, yet, taken with its context, it evidently enough means that the defendants passed themselves off for the bank which the plaintiff had established. [WILLES, J.—In order to give the plaintiff a right of action, he must show that he is damnified; and, to show that, he ought to have alleged *93] that he had carried on *business at the bank said to have been established by him. No action could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer’s mark, which mark had never been put forth to the world by the party complaining of the misuser of it. I have some recollection of a case where an eminent physician sought to restrain a druggist from vending pills purporting to have been made by him, but failed on the grounds I have stated.(a)]

Turner, in reply, was stopped by the court.

JERVIS, C. J.—It is not necessary in this case to give any opinion as to what might be the liability of a trading corporation which, after notice, does an act to injure another; because I do not think it appears upon the face of this declaration that the plaintiff had so established himself in the business of a banker as to entitle him to complain of that which the defendants are alleged to have done. All that appears, is, that the plaintiff was the promoter of a certain bank called The Bank

(a) The case alluded to by the learned judge, was, *Clarke v. Freeman*, 11 Beavan, 112. The medicine in question was advertised as “Sir James Clark’s Consumption Pills.” Lord Langdale, M. R., there says: “My notion is, that the court can interfere in cases of mischief being done to property by the fraudulent misuse of the name of another, by which his profits are diminished.” “I cannot liken this case to that of *Croft v. Day*, 7 Beavan, 84, where a man fraudulently attempted to make his own goods pass off as the goods of another, to the prejudice of that other.”

of London, which he proposed to establish in the city of London; that he had incurred expense in putting up the name on a brass plate, and in publishing prospectuses; and that some one else has beaten him in the race, and established a bank under the same name by virtue of letters patent. It does not appear that the *plaintiff has ever carried on the business of banking, or that he had a single customer, [94 or that he was in a position to be damnified by the acts of the defendants. I therefore think, without entering into the question how far a corporation established for trading purposes might render itself liable to a charge such as that now sought to be fixed upon these defendants, enough is not alleged in this declaration to show that the plaintiff has sustained any injury, and consequently the action will not lie.

CRESSWELL, J.—I am entirely of the same opinion. The plaintiff in his declaration cautiously abstains from averring that he has carried on the business of a banker, and has sustained damage in that business through the fraudulent acts of the defendants. It is unnecessary to observe upon the latter part of the declaration, though I must say I think it is very skilfully prepared with a view to lay before the court some semblance of a cause of action.

CROWDER, J.—I am of the same opinion. I must confess I feel quite at a loss to understand from this declaration what it is that the plaintiff did, or what it is that he complains of the defendants' having done. At all events, it does not appear that the plaintiff had ever carried on the business of a banker.

WILLES, J.—I also am of opinion that the defendant is entitled to the judgment of the court upon this demurrer. In any way of reading the declaration, one cannot glean from it that the plaintiff had ever carried on the business of a banker. If that had been averred in the declaration, and it had been shown that the defendants carried on their business under the same name, for the purpose of making it to be believed that it was the plaintiff's business, then the question whether a corporation could as *such be liable for such a fraud, would have arisen. [95 I am not prepared to say that they would not be liable, if the cause of complaint were properly alleged. They would have capacity to do the act, and might possibly be responsible for its consequences. I agree with the rest of the court in thinking that the plaintiff has not alleged in his declaration that he had such an interest as to entitle him to maintain an action,—possibly because he had it not.

Judgment for the defendant.(a)

(a) The principle upon which courts of equity proceed in cases of infringement of trademarks is well expounded in some of the recent decisions. In *Purser v. Brain*, 17 Law Journ. Ch. 141, an injunction was granted at the suit of the plaintiff, who represented "The London Manure Company," to restrain the defendants from using the style and title of "The London Patent Manure Company," and from publishing circulars in imitation of the plaintiff's circulars—the ground of the injunction being, that the name adopted by the defendants so nearly corresponded with that of the plaintiff, and the circulars were so exactly similar, that the public would be misled and the plaintiff defrauded. In *Knott v. Morgan*, 2 Keen, 213, an injunction was

granted to restrain the defendant from running an omnibus having upon it such names, words, and devices as to form a colourable imitation of the words, names, and devices on the omnibuses of the plaintiffs. And Lord Langdale, M. R., said: "It is not to be said that the plaintiffs have any exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' or any other words: but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiffs." In *Perry v. Truefitt*, 6 Beavan, 66, Sir L. Shadwell, M. R., says: "I think that the principle on which both the courts of law and equity proceed in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man: he cannot be permitted to practise such a *deception, nor to use the means which contribute to that end.

*96] He cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but, whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark. The question is, whether, in a case where there has not been on the part of the defendant an intention to sell the article as the article manufactured by the plaintiff, there is enough to induce the court to grant the injunction?" The injunction in that case was stayed, with liberty to the plaintiff to bring an action: the plaintiff, however, took no steps to try the question at law, and the bill was afterwards dismissed with costs. The same learned judge in *Croft v. Day*, 7 Beavan, 84,—upon an application for an injunction to restrain the defendant from selling blacking labelled as "*Day & Martin's Blacking*," in fraud of the plaintiff,—says: "It has been very correctly said that the principle in these cases is this,—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion [in *Perry v. Truefitt*], that, in my opinion, the right which any person may have to the protection of this court, does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is, to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names of *Day & Martin*,

but upon the fact of the defendant using those names in *connexion with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not in fair and honest dealing entitled." In *Spottiswoode v. Clarke*, 2 Phillips Ch. R. 154,—upon an application to discharge an order made by the Vice-Chancellor of England (Sir L. Shadwell), restraining the defendant from selling or exposing for sale any almanacs bound in wrappers or covers, with the title "*Pictorial Almanac*" printed thereon, or having any other title printed thereon, so as, by colourable representation or otherwise, to represent the almanac published and sold by the defendant to be the same as the almanac printed and sold by the plaintiff for the year 1847,—Lord Cottenham, C., said: "In the course of the argument, cases of trade-marks were referred to: but trade-marks have nothing to do with this case. Take a piece of steel: the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article: so it is of blacking, or any other article of manufacture, the particular quality of which is not discernible by the eye. But these cases are quite different from the present case, in which, if you are deceived at all, it is not by the eye. The size, the colour, the engravings, are all distinct in the two works, so that no one who sees the two could mistake the one for the other." *Franks v. Weaver*, 10 Beavan, 297, also, was the case of a deceitful substitution of another article for the plaintiff's. Lord Langdale, M. R., says: "Nobody has been able to define what fraud is; it is so multifarious: in this case it consists in the crafty adaptation of these words [*Franks's Specific Solution of Copaiba*] in such a manner as to make it appear that the thing sold is prepared by the plaintiff. Care must be taken that the

injunction be so framed as not to go further than to prevent the defendant using the name or testimonials of the plaintiff for the purpose of securing to himself an unjust advantage to which he has no title." And in *Burgess v. Burgess*, 3 De G. M'N. & G. 896, Lord Justice Turner says,—"No man can have any right to represent his goods as the goods of another person; but, in applications of this kind, it must be made out that the defendant is selling his own goods as the goods of another."

And see *The London and Provincial Law Assurance Society v. The London and Provincial Joint Stock Life Insurance Company*, 11 Jurist, 838.

The American cases cited ante, p. 90, note (a), show that the same principle governs the decisions of the courts of that country. Indeed, the whole of the American law upon this subject, as also upon the kindred subject of copyright, approximates very closely to that of this country.

To the American cases cited in the house under a certain name, and the note at p. 90, on the subject of trade-marks, may be added: *Partridge v. Menck*, 2 Barbour Ch. R. 101; *Howard v. Henriques*, 3 Sandf. Sup. Ct. 725; *Coffeen v. Brunton*, 4 M'Lean, 516.

Where the proprietor of a hotel had established a high reputation for his

same name was used by another person for another house, it was held, that the latter could be enjoined against using such name, as the case came within the principle which made trade-marks personal property: *Howard v. Henriques*, 3 Sandf. Sup. Ct. 725.

*HUGHES v. TINDALL. April 29.

[*98

A policy of assurance entered into with a mutual insurance association contained amongst others a regulation (the sixteenth) which provided, that, if a ship insured in the association should be mortgaged for any debt, the owner, being a member of the association, should not have any claim by virtue of the policy, nor should any assignee of such policy have any claim for any loss, unless previously to such loss such member should have delivered to the secretary an undertaking in writing of the mortgages or assignees to pay all sums which might thereafter become due from such member in respect of such ship.

In an action upon the policy for a total loss, the defendant pleaded, that the ship was mortgaged, and that the plaintiff did not previously to the happening of the loss deliver to the secretary an undertaking of the mortgagees to pay all moneys, which might thereafter become due from the plaintiff in respect of the ship.

The plaintiff replied, that the defendant had notice of the mortgage, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagees all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff as a member of the association became liable.

Held, that the replication was no answer to the plea,—the giving of the undertaking required by the sixteenth regulation being a condition precedent.

THIS was an action upon a policy of insurance. The declaration stated that the defendant, in consideration of 205*l.* 11*s.* 6*d.* paid to him by the plaintiff, promised the plaintiff that the several members of the Protector Insurance Association, every member bearing his equal proportion according to the sums mutually insured therein, as per list affixed to the policy thereafter mentioned, would become and be assurers to the plaintiff of the sum of 1000*l.* upon the ship named in a certain policy of insurance whereto was affixed a list purporting to be a list of ships insured in the Protector Insurance Association, of the tonnages, masters, owners, ports, and values of the same, and also of the sums by the mem-

bers of the said association mutually insured therein, made by the plaintiff the 23d of March, 1850, and then subscribed by the defendant per procuration of the said several members, as per list affixed as aforesaid, purporting thereby that the plaintiff, as well in his own name, as for and in the name and names of all and every person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from the meridian of the 20th of March, 1850, to *99] and with the meridian of *the 20th of March, 1851, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the "Diamond," whereof was master, &c., beginning the adventure upon the same goods and merchandises from the loading thereof aboard the said ship, &c., upon the said ship, &c., &c., and so should continue and endure during her abode there, upon the said ship, &c.; and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, should be arrived at as above, upon the said ship, &c., until she should have moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed: And it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at, any ports and places whatsoever, &c., without prejudice to that insurance: The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and the insurers in that policy, were and should be valued at 1500*l*. Touching the adventures and perils which they the assurers were contented to bear and did take upon them in that voyage, they were of the seas, men-of-war, &c., &c., and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof; and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to that insurance; to the charges whereof they the assurers would contribute each one according to the rate and quantity of his sum *100] *therein assured: And it was agreed by them, the insurers, that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London; and so they, the assurers, were contented and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of 2*l*.

per cent.: And that, in witness thereof, they, the assurers, had subscribed their names and sums assured in London: That, by a certain memorandum thereupon written, it was declared that the said insurance was on ship; and by a certain other memorandum thereunder written, corn, fish, salt, fruit, flour, and seed, were warranted free from average, unless general or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins, were warranted free from average under 5*l.* per cent., and all other goods, also the ship and freight, were warranted free from average under 8*l.* per cent., unless general or the ship should be stranded; and by a certain other memorandum thereunder written, it was mutually agreed that certain annexed regulations should form part of that policy, which said regulations were in the words and figures following, that is to say,—

“The Protector Insurance Association, London.

Secretary, &c., &c.

“At a general meeting held the 4th of March, 1850, it was unanimously agreed,—“1. That the members of this association shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each others' ships or shares of ships, from noon of the 20th day of March, *1850, [*101 or from the date of entry of each vessel respectively, until noon of the 20th day of March, 1851, against all losses, perils, and damages of whatever nature or kind soever which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances hereinafter particularly excepted.

“2. That the sums to be insured in this association shall be from 300*l.* to 1000*l.* on each ship; and that the assured shall pay 4*s.* per cent. commission on the sum insured, also for survey, policy-duty, and power of attorney.

“3. That each ship must be approved of by the committee, and all vessels not classed A 1, or Æ 1, in Lloyd's register-book, shall be subject to an annual survey by the committee, or some person duly appointed by them for that purpose; and the owner of every ship not so classed shall give the secretary notice in writing of her return from every foreign voyage, if exceeding six months; and, in the event of his neglecting to do this, he shall suffer a deduction of 10*l.* per cent., in case of loss or average.

“4. That no member shall anywhere insure his ship for more than the sum at which she is valued in this association; but, in the settlement of particular average on the hull, where one-third has been deducted, a nominal value of 5*l.* per ton on colonial-built ships, and 6*l.* per ton on British-built ships, such sum not being less than two-thirds the entered value, shall be taken for adjusting the same.

“5. That ships shall not be insured when employed in any unlawful trade, with the knowledge or consent of the assured, nor when employed

in the fisheries to Greenland or Davis's Straits, or in the Hudson's Bay trade, nor when or after loading or unloading on any main shore *102] *or beach, nor from any losses by the sea risk when and after being in the Solway Frith, or in the ports of Dundalk, Annan, Dumfries, Preston, or Lytham, nor when or after proceeding higher than Glasson Dock, in Lancaster river; and that ships being employed in any case contrary to this rule shall not be entitled to recover for any loss by the sea risk on any subsequent voyage, until surveyed in a safe port by some person appointed by the committee, and readmitted.

"6. That no ship shall be insured by this association sailing from the united kingdom on the following voyages, after the periods set opposite thereto, nor until her return to Great Britain or Ireland, and notice thereof be given to the secretary, who, on receiving a declaration in writing from the master that she has not touched the ground during the suspension of the policy, shall readmit her, viz., British colonies in North America (the ports and places in the Saint Lawrence above Cape Gaspe excepted), 1 September; the ports and places in the Saint Lawrence above Cape Gaspe, 25 August.

"7. That ships sailing from the United Kingdom of Great Britain and Ireland, or passing the South Foreland, on the following voyages after the periods set opposite thereto, shall be subject to a deduction of 10l. per cent. in case of loss or average,—ports in the White Sea, 5th August; lower ports in the Baltic, not higher than Memel, inclusive, and in any port or place in the Belt, Sound, or Cattegat, except Gottenburgh, 20 October; Riga and the ports in Riga Bay, and Stockholm, 12 October; the ports in the Gulf of Finland and Bothnia, 5 October; and ships sailing from the United Kingdom, or passing the South Foreland on the aforesaid voyages, eight days later than the above dates, shall be subject to a deduction of 20 per cent. in case of loss or average; and that no vessel be insured sailing more than fifteen days later, *103] excepting those from the *Mediterranean, or ports to the south of Gibraltar: that the time of clearing at the Custom House be deemed the time of sailing, provided the ship be laden or ballasted and equipped for the voyage; and that each day be considered by the members of this association as ended at noon.

"8. That any ship sailing on any voyage prohibited by this association shall thenceforth cease to be insured; but, on notice in writing being given to the secretary, may be exempted from contribution to any losses or averages which may occur after the date of such notice, but not otherwise: and all ships repairing at the owners' expense for the space of thirty days or longer, may likewise cease to contribute to the sea and war risks during such time, provided regular notice be given to the secretary, both at the commencement and conclusion of the repairs, and a sufficient number of shipwrights be employed to expedite the work.

"9. That, in the event of any ship insured in this association being in or sailing from any part of the West India Islands or Colonies, the Bay of Honduras, or any part of the Gulf of Mexico, or the Spanish Main, between 1st of August and 12th of January, or being laden with small coals, called dough-stone, kelp, rock-salt, ore, iron, lead, bricks, or slates, all or either, shall suffer a deduction of 10 per cent. in case of loss or average, and, if exceeding 40 per cent. of the aforesaid commodities, above the register tonnage, O. M., 15 per cent.

"10. That Messrs. George Tindall, Thomas D. Hopper, Frederick Walker, William N. Frost, and Josiah E. Denham, with power to add two to their number, be appointed as a committee for superintending the affairs of this association, who shall meet on the first Wednesday on every alternate month, to audit the accounts, settle claims, and order payment of the same by the secretary's draft at sixty days' date; and that every non-resident *member shall appoint an agent in London to transact his business with the association. [*104

"11. That no member of the committee shall act as such in the settlement of his own loss or average.

"12. That all average claims be adjusted by a professional average-stater, according to the usage of Lloyd's (except as hereafter particularly stated), and delivered at the office of the secretary six days previous to the periodical meeting of the committee, to entitle the claimant to a settlement at such meeting: but, should the committee be dissatisfied with such adjustment, they may refer the same to two arbitrators in London, one to be chosen by the committee, and the other by the assured, within ten days, notice being given by the secretary, otherwise the decision of the committee to be conclusive, with power for such two persons to appoint an umpire; and the award of any two of such three persons shall be final: but the committee and assured may (by mutual consent) refer such claim to one person only, whose award shall as aforesaid be final and conclusive.

"13. That, in the statement of average, caulking shall not be allowed, except the vessel has been thoroughly caulked within five years, and the difference of price on copper or metal between new and old shall not be allowed, if the same has been on more than four years; but, if it has been on only one year, five-sixths of the difference in price shall be allowed; if two years, three-fourths; if three years, two-thirds; if four years, one-half.

"14. That all drafts for claims written off by the committee shall be duly accepted and punctually paid when due; and, if any member shall neglect or refuse to pay his contribution, on receiving notice from the secretary, his respective ship or ships shall immediately cease to be insured in or by this association, but he shall still be liable to contribute to all losses and averages *which may occur during the continuance of the policy: that the solicitors be directed to sue immediately for the amount due on behalf of the secretary. [*105

"15. That the committee shall have full power to survey, or appoint any other person or persons to survey, ships insured in this association, and to order such materials and stores as they may deem necessary; and any member refusing to comply with the orders of the committee, after receiving notice of such order through the secretary, shall, in case of loss or average before the required stores and materials are provided, and repairs done, suffer a deduction of 15l. per cent.

"16. *If the whole or part of any ship insured in this association shall, at the time of entering, or afterwards, be mortgaged or assigned to any person or persons for any debt or debts, the owner of such ship, being a member of this association, shall not have any claim by virtue of the policy, nor shall any assignee of such policy have any claim, for any loss or damage which may be sustained by such ship, unless, previously to the happening of such loss or damage, such member shall have delivered to the secretary an undertaking in writing of the mortgagee or assignee to pay all sums of money which may thereafter become due from such member in respect of such ship; nevertheless, such member shall still be liable for and shall pay his contributions and demands, the same as if such mortgage or assignment had not been made.*

"17. That, if any vessel be laid up, with or without cargo, in a port of Great Britain or Ireland, for the space of thirty days or more after the 20th of December (the commencement and termination of such period being notified to the secretary in writing, and the association being thereby exempted from all risk thereon, except fire), the owner shall be *106] entitled to a return of 6d. per cent. per diem, in conformity with *such notice; which return shall be drawn for upon all the members of the association.

"18. That this association shall be liable to contribute its proportion (but not beyond the sum insured) for damages which any ship insured herein may do to other ships or craft, so that the loss sustained be not less than 3 per cent., excepting when connected with a particular average happening at the same time, and amounting together to that sum; provided always, that proper means be adopted by the owner to recover the damage against the ship or craft or parties legally liable: nevertheless, in the event of any ship doing damage to another, such ship shall contribute towards the cost of repairing such damage.

"19. That, when ships in the North Sea, or seas adjacent, have not been heard of for four months, or in the Atlantic, or seas adjacent, for six months, the committee shall order payment to be made in the usual manner, on satisfactory security being given for repayment of the amount in case the ship be not lost; but that such ship shall be considered lost, and cease from risk on others at the end of two months, if missing in the North Sea, and at the end of four months if missing in the Atlantic, or other seas. N.B. Any ship sailing previous to the 19th March, 1851, and not heard of after that time, shall be considered lost on the last day covered by the policy.

"20. That, in case of loss, the owner shall remain an underwriter on all other ships for forty-eight hours thereafter; but, in case of sale, shall cease to be an underwriter from the date of the transfer, when the policy shall be considered as cancelled, unless transferred to the purchaser by the permission of the committee; and that, in the event of the death of any member, the executor or administrator shall be allowed to withdraw *his ship or ships, on giving the secretary a written [*107 notice to that effect.

"21. That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause a similar notice to be given to the owner.

"22. That the committee shall have full power to settle all claims on policies, and contingent expenses, and also to call general meetings of the association, which shall have authority to make, repeal, or alter, or amend these or any subsequent rules or regulations for the government of the association; and the decision of the majority at such meetings shall be binding and conclusive on all the members, provided it does not affect ships having actually commenced a voyage or being under charter: in either of those cases, such vessels to be exempt from the operation of any alteration until the completion of the voyage or expiration of the charter. At all general meetings, members shall be entitled to one vote for each ship entered, and may vote by proxy, such proxy being a member.

"23. That all letters and notices be sent through the post-office.

"24. That every member wishing to propose any alteration in the rules at an annual general meeting, shall give notice thereof to the secretary on or before 15th of January preceding the said meeting; and every member shall have a copy of such proposition given him with the notice of the meeting."

The declaration then averred, that the plaintiff, during the risk thereafter mentioned, and until and at the time of the loss thereafter mentioned, was interested in the said ship to the value in the said policy mentioned; that, before the making of the said policy, to wit, on the *9th of January, 1850, the said ship departed and set sail, and, [*108 at the time of the making of the said policy, was proceeding from the port of Cardiff, in Wales, on a voyage to Panama, with a cargo of coals, and that the said voyage was one protected and not prohibited or excepted by the said policy and regulations, and the said employment of the said ship was one not prohibited or excepted by the said policy and regulations; that the said ship, whilst she was attempting to prosecute her said voyage, and whilst she was so employed as aforesaid, and under circumstances not excepted by the said regulations, after the meridian of the 20th of March, 1850, and before the meridian of the 20th of March, 1851, to wit, on the 1st of July, 1850, was, by perils and dan-

gers of the seas, wholly lost, and never did arrive at Panama aforesaid; that the said ship was not insured when employed in any unlawful trade, with the knowledge or consent of the assured, nor when employed in the fisheries to Greenland or Davis's Straits, or in the Hudson's Bay trade, or when or after loading or unloading on any main-shore or beach; and that the plaintiff did all things on his part necessary to entitle him to have the said insured sum of 1000*l.* paid to him according to the terms of the said policy, and the said promise of the defendant, and that the same had not been paid.

The fifth plea stated, that, before and at and after the time of the making of the said promise, the said ship was mortgaged and assigned by the plaintiff to divers persons respectively for divers debts due from the plaintiff to such persons respectively; and that, at the time of the making of the said policy, and thence continually up to and at and after the said loss and damage in the said first count mentioned, the plaintiff was a member of the said association in the declaration mentioned, and the *109] owner of the said ship or vessel subject *to such mortgages and assignments; and that the plaintiff did not, nor did any person, previously to the happening of the loss or damage in the declaration mentioned, or at any time, deliver to the secretary of the said association, or to the said association, or to any person, any undertaking in writing, or otherwise, of any of the said persons, so being such assignees and mortgagees, or any undertaking whatever of any person whatever, to pay all sums of money which might thereafter become due from the plaintiff in respect of the said ship, or to pay any sum of money to become due in respect of such ship, or to make any payment whatever.

And for a second replication to the defendant's fifth plea, the plaintiff said, that, after the making the said mortgages and assignments, and previously to the happening of the said loss or damage, the defendant, he then thence hitherto and still being the secretary of the said association, had notice of the said mortgages and assignments, and afterwards, before the happening of the said loss or damage (without requiring any such undertaking as in the fifth plea mentioned), from time to time demanded of and received from the said mortgagees and assignees, as such mortgagees and assignees, all the sums of money which thereafter became due from the plaintiff in respect of the said ship, and the contributions and demands for which the plaintiff as such member of the said association thereafter became and was liable; and that the plaintiff now sues as trustee on the behalf and for the benefit of the said mortgagees or assignees, and not otherwise.

The defendant demurred to the second replication to the fifth plea; the ground of demurrer stated in the margin being, "that the demand and receipt by the defendant of the sums of money mentioned in the replication demurred to, make no answer to the defence set up by the fifth plea." Joinder.

**T. Jones*, in support of the demurrer.(a)—The fifth plea is founded upon the sixteenth regulation; and the question is, [110 whether the plaintiff can claim the benefit of the policy, he having failed to comply with the requirements of the sixteenth rule. That rule provides, that, if a ship insured in the association shall be mortgaged or assigned for any debt, the owner, being a member of the association, shall not have any claim by virtue of the policy, nor shall any assignee of such policy have any claim for any loss, unless previously to such loss such member shall have delivered to the secretary an undertaking in writing of the mortgagee or assignee to pay all sums which may thereafter become due from such member in respect of such ship. A compliance with that regulation, it is submitted, is a condition precedent to the plaintiff's right to maintain an action upon the policy. The excuse he offers in the replication for the non-compliance, is, that he has done something which either in fact or in law is equivalent thereto, viz., that the defendant had notice of the mortgages and assignments, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagees and assignees all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff as a member of the association became liable. That clearly is no answer to the non-performance of the condition.

**Keane*, *contra*.(b)—The contract contained in the policy and the regulations, is, a contract between the assured and the mortgagees, who are bound to do that which the sixteenth rule requires, or that which is equivalent thereto. [CRESWELL, J.—Does the replication show that the plaintiff, or the mortgagees, paid all that might become due from him in respect of the ship?] Not in terms: but it states that the defendant demanded and received from the mortgagees all sums which became due from the plaintiff in respect of the ship, and the contributions and demands for which the plaintiff as a member of the association thereafter became and was liable: and his liability only [111

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the defendant's liability is dependent on the condition that the undertaking specified in the sixteenth regulation be given before the loss:

"2. That such condition is not waived or discharged by force of any of the facts stated in the replication:

"3. Assuming the facts stated in the replication to operate as a waiver or discharge of such condition, that such facts are nevertheless inconsistent with and repugnant to the claim made by the declaration, and set up another and a different claim, and do not entitle the plaintiff to judgment in respect of the claim made in the declaration:

"4. That the replication is a departure from the declaration."

(b) The points marked for argument on the part of the plaintiff were as follows,—“That the policy contemplates assignments and mortgages thereof, and that the dealings of the defendant with the actual assignees and mortgagees disclosed by the replication, either amount to a waiver of the sixteenth condition, or show that in respect of that condition the plaintiff has done everything to enable him to recover; and that, regard being had to the regulations of the policy, the facts set forth in the second replication to the fifth plea show that the defendant is not entitled to set up in this action the defence disclosed by his said plea.”

continues for forty-eight hours after a total loss. The mortgagees are treated as the parties with whom the association contract. [CRESSWELL, J.—The mortgagees have not made themselves liable for all future payments.] If the court entertain a strong opinion that the replication is insufficient, the plaintiff would pray leave to amend. [WILLES, J.—An amendment will not avail, unless the plaintiff can reply a waiver of the condition contained in the sixteenth rule.]

Per Curiam.—The plaintiff may have leave to amend, upon the usual terms. Rule accordingly.

*112] *RODGERS v. PARKER. May 7.

The 11 G. 2, c. 19, s. 19, only entitles the tenant to recover in an action for any irregularity in dealing with a distress, *where actual damage is proved.*

The plaintiff declared in case for an irregular distress, alleging in one count that the defendant, having distrained certain growing wheat as a distress for rent, and having caused the same to be cut and carried away, instead of impounding, appraising, and selling the same, suffered other persons to carry the same away and convert the same to their own use, whereby the plaintiff was injured, and was deprived of the surplus.

There was also a count in trover.

The evidence was, that the defendant seized the plaintiff's growing wheat as a distress for rent, and sold it (for its full value) on the premises in a growing state,—that the purchaser cut the wheat, and carried it away,—and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff. The jury found that the plaintiff sustained no damage by the transaction:—

Held, that, upon these facts; and upon this finding, the plaintiff was not entitled to recover even nominal damages upon either count.

Proudlove v. Twemlow, 1 C. & M. 326,† observed upon.

THIS was an action for an irregular and excessive distress.

The first count of the declaration stated, that the plaintiff was tenant to the defendant of certain land, and the defendant seized and took and distrained certain *growing wheat* of the plaintiff, then being on the said land, for rent then alleged to be due and in arrear to him, the defendant, from the plaintiff, in respect of the said land, and afterwards caused the said wheat to be cut, cured, and carried away, and kept and detained from the plaintiff, as a distress for the said arrears, although, at the time of the making of the said distress, and of the cutting, curing, and carrying away and detaining of the said wheat, a small part only of the said alleged arrears was in fact due, and a small part, to wit, one-half of the said wheat would have been sufficient as a distress for so much of the said arrears as was in fact due, and for the costs, charges, and expenses of the said distress, and of the cutting, curing, and carrying away of the said wheat, and of the appraisement and sale thereof, and for all moneys which the defendant was entitled to levy by the said distress; whereby the defendant took and kept from the plaintiff an excessive distress for so much of the said alleged arrears as was in fact due, and the plaintiff was wrongfully deprived of a great portion of the said wheat.

*113] *The second count stated, that, for divers years before and at the time of the committing of the grievances thereafter men-

tioned, the plaintiff occupied, held, and enjoyed certain land as tenant thereof to the defendant at a rack-rent, the said land being land situate at Morton, mentioned in The Black Sluice Drainage Act, 1765,(a) and made liable to the tax of 9*d.* an acre per annum by virtue of that act, and to the additional tax of 9*d.* an acre per annum by virtue of The Black Sluice Drainage Act, 1770,(b) and liable to the additional tax of 2*s.* 6*d.* an acre per annum by virtue of The Black Sluice Drainage Act, 1846,(c) during the period for which by that act such liability was imposed, and liable to the tax of 2*s.* 3*d.* an acre per annum by virtue of The Black Sluice Drainage Act, 1849,(d) during the period for which by that act such liability was imposed, and liable to the tax of 4½*d.* per acre per annum by virtue of the last-mentioned act, the said land being land comprised within the district called in the last-mentioned act the eighteen-penny district, and being other than and distinct from the lands in Bourn and Dike mentioned in the last-mentioned act: that, while the plaintiff was such tenant as aforesaid to the defendant, divers moneys on account of the said taxes became and were by virtue of each of the said acts respectively due and payable by the plaintiff as such tenant and occupier, for the land whereof the plaintiff was such tenant and occupier, and were by the plaintiff as such tenant and occupier paid, which moneys, the plaintiff not having previously deducted from the rent payable by him to the defendant for the said land, he the plaintiff was, by virtue of the said acts, entitled to deduct and desirous of deducting from the arrears of rent for which the defendant distrained as thereafter *mentioned,—of all which the defendant, at the time of the com- [*114 mitting of the said grievances, had notice: yet that the defendant, intending to injure the plaintiff, wrongfully and maliciously seized, took, and distrained certain out timothy-grass and growing wheat of the plaintiff, then being on the said land, for the full amount of the rent then in arrear from the plaintiff to the defendant for the said land, and refused to allow the moneys so by the plaintiff paid as aforesaid to be deducted from the said rent, and caused the same wheat to be cut, cured, and carried away, and kept and detained from the plaintiff as a distress for the whole of the said arrears, and the costs and expenses of the said distress, without deducting or allowing from or out of the said rent the said moneys so by the plaintiff paid as aforesaid, or any part thereof, though a small part of the said wheat, to wit, one-half thereof, would have been sufficient as a distress for the arrears of rent, and for the costs and expenses of the said distress, and the costs and charges of cutting, curing, and carrying away the said wheat, and appraising and selling the same, and for all moneys which the defendant was entitled to levy by the said distress, if the moneys so by the plaintiff paid as afore-

(a) 5 G. 3, c. lxxxvi.

(b) 10 G. 3, c. xli.

(c) 9 & 10 Vict. c. cccxvii.

(d) 12 & 13 Vict. c. lix.

said had been deducted as aforesaid; whereby the defendant took an excessive distress, and whereby the plaintiff was deprived of his right and opportunity of deducting the said moneys under the said statutes, and was likely to lose the same, and was unjustly deprived of a great portion of the said wheat.

The third count stated that the defendant seized, took, and distrained, on certain land which the plaintiff held as tenant to the defendant, certain cut timothy-grass of the plaintiff, as a distress for certain arrears of rent then alleged by the defendant to be due to him for the said land; and that the defendant, having so distrained the said cut timothy-
*115] grass, took such bad care of the same, *and carelessly left the same exposed to the open air and rain for so long a time while it was in the defendant's possession as such distress, that, by reason thereof, the same was spoiled.

The fourth count stated that the defendant, having distrained certain growing wheat of the plaintiff as a distress for certain arrears of rent then alleged to be due from the plaintiff to the defendant for certain land on which the said wheat was growing, and held by the plaintiff of the defendant, and having caused the said wheat to be cut, cured, and carried away, he, the defendant, instead of impounding, appraising, or selling the said wheat when cut, in satisfaction of the said arrears, wrongfully suffered and permitted and caused certain persons to convert the said cut wheat to their own use while the defendant had the same under the said distress, whereby the same was wholly lost to the plaintiff, and the plaintiff was deprived of the overplus of money which he would have been entitled to if the said wheat had been sold by the defendant when cut, under the said distress.

The fifth count stated that the defendant wrongfully fastened and kept fastened a gate of the plaintiff, being the gate of a certain field of the plaintiff, whereby the plaintiff was prevented from driving certain cattle of the plaintiff to get water; by reason whereof the said cattle, in order to get water, broke through the fences of the said field, and damaged the same, and trespassed on and damaged another person's land, and were therefore distrained damage feasant, whereby the plaintiff was obliged to pay 2*l.* in and about procuring them to be released.

The sixth count charged the defendant with having wrongfully converted to his own use the plaintiff's goods, that is to say, cut timothy-grass, and cut wheat, straw, and wheat in the grain.

*116] *And the plaintiff also sued the defendant for money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the plaintiff's use; and the plaintiff claimed under the count for money payable, 100*l.* for debt, and 10*l.* for detention, and under the previous counts of the declaration 100*l.*

To the first six counts the defendant pleaded not guilty "by statute

11 G. 2, c. 19, s. 21, a public act," and, as to the residue of the declaration, never indebted.

The cause was tried before Coleridge, J., at the last Summer Assizes at Lincoln. It appeared that the defendant on the 26th of July, 1854, seised as a distress for rent certain growing wheat of the plaintiff's and sold it on the 17th of August on the premises in a growing state, and that the purchaser cut and carried it away,—the surplus, after satisfying the rent, being handed over to the plaintiff.

On the part of the plaintiff, it was submitted that the sale of the growing crops was altogether illegal, and not merely irregular.

The learned judge told the jury, that, if they were of opinion that the plaintiff had sustained no actual damage by the mode of dealing with the distress, the defendant was entitled to a verdict.

The jury found that the plaintiff had not sustained any damage, and thereupon the learned judge directed a verdict to be entered for the defendant.

Mellor, in Michaelmas Term last, obtained a rule nisi for a new trial, on the grounds,—first, that the learned judge misdirected the jury in stating, that, if they were of opinion that the plaintiff had sustained no actual damage by the mode of dealing with the distress, the defendant was entitled to a verdict,—secondly, that the plaintiff was at all events entitled to a verdict for *nominal damages on the fourth and sixth counts. He cited *Owen v. Legh*, 3 B. & Ald. 470, and [*117 *Proudlove v. Twemlow*, 1 C. & M. 326.†

Hayes, Serjt., in Hilary Term last, showed cause.—The 11 G. 2, c. 19, s. 8, empowered the landlord to "take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever which shall be growing on any part of the estates so demised or holden, as a distress for arrears of rent, and the same to cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premises so demised or holden,—and, in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn or proper place which such lessor or landlord, lessors or landlords, shall hire or otherwise procure for that purpose, and as near as may be to the premises,—and in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of; and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before." And s. 19 enacted, that, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not therefore be deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab

initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and *no more*, in an action of *118] trespass or on the case at the election of the plaintiff *or plaintiffs." Not long after the passing of that statute, it was held, in *Wallace v. King*, 2 H. Blac. 18, that *trover* will not lie for goods irregularly sold under a distress, "not being a remedy which could be pursued since the statute of 11 G. 2, c. 19, as it tended to place the landlord in the same situation as before the passing of the act, by considering him as a trespasser *ab initio*." In that case, the sale took place before the expiration of the five days. [JERVIS, C. J.—That would not be the subject of an action of *trover*.] That case, which has always been considered an authority, is not to be distinguished from the present: in each, the distress was lawful in its inception. The same point was determined in *Avenell v. Croker*, M. & M. 173 (E. C. L. R. vol. 22), where Lord Tenterden says,—“The count in *trover* cannot be maintained; for, the landlord had a right to distrain, and the tenant has no cause of complaint, unless for some irregularities in the distress.” In *Whitworth v. Smith*, 1 M. & Rob. 193, on *Wallace v. King* being cited, it was contended, on the part of the plaintiff, that “*Wallace v. King* merely decided, that, since the statute, *trover* would not lie for an *irregular* distress. The 19th section of the statute 11 G. 2 solely applies to *irregularities* in distraining, and does not affect the case of an excessive distress: the statute applies in terms only to cases where ‘rent is justly due;’ here, the rent distrained for was not due, the rent in arrear being only 8*l.* 8*s.*, while the value of the goods seized was 219*l.*” But Lord Tenterden said: “In the absence of any express authority, I think *trover* does not lie for the goods, there having been some rent due when the distress was made, though the distress was excessive. A distinction is attempted to be drawn between this case and *Wallace v. King*, on the ground that *there* the whole of the rent distrained for was actually due. There certainly is that distinction, but I think the words of the statute *119] 11 G. 2 are *satisfied, if any rent is due at the time of the seizure.” The language of the statute is equally applicable to *trover* as to trespass. *Owen v. Legh*, 3 B. & Ald. 470, decides that the selling the distress is no conversion; and that is the only act the landlord is charged with doing in this case. And *Proudlove v. Twemlow*, 1 C. & M. 326,† can hardly be considered an authority sufficient to contravene the cases above cited. There were several counts for irregularities in the distress, and a count in *trover*. It was proved that the defendant had seized the goods of the plaintiff, and also the growing crops, under a distress for 120*l.* rent, and had sold the crops before they were cut, and that the same were afterwards cut and taken away by the purchaser. The plaintiff having obtained a verdict for 1*s.* damages on the counts for the irregular distress, and for 97*l.*, the value of the crops, on the count in *trover*.

Upon a motion to reduce the damages on the last count, Lord Lyndhurst said: "I am of opinion that this case is within the statute: *the distress was originally lawful*, but the sale was unlawful and irregular. By the express terms of the act, the party injured by an unlawful act committed after a *lawful distress*, is only to recover the amount of the damage he has actually sustained. The wheat sold for more than its full value; and, as more than the amount was due for rent, the damages ought to be merely nominal." The court were not asked to enter the verdict for the defendant upon the count in trover. Then, as to the fourth count, the complaint is, that the wheat was prematurely sold while growing. No doubt, the sale and subsequent dealing with the wheat was in this respect irregular: but it sold for its full value; and, besides, the plaintiff was an assenting party, receiving the surplus, and giving the bailiff a receipt for it. In effect, the fourth count is nothing more than a special count in trover.

**Mellor and Beasley*, in support of the rule.—*Wallace v. King*, [*120 2 H. Bl. 13, was the case of an irregular mode of doing a lawful act. All that was decided in *Avenell v. Croker*, M. & M. 173 (E. C. L. R. vol. 22), was, that, for a mere irregularity, trover will not lie, but that the plaintiff shall recover only special damages resulting from the irregularity. The same observation applies to *Whitworth v. Smith*, 1 M. & Rob. 193: that which was complained of was, merely an irregularity in the mode of doing a lawful act. Here, however, the complaint is, that the act done by the defendant was altogether *unlawful*: a landlord has no right by law to sell growing crops until they are appraised, nor to appraise them till they are "cut, gathered, cured, and made:" 11 G. 2, c. 19, s. 8. [CRESSWELL, J.—Suppose after the sale, and before the crops were carried, the tenant had tendered the amount of rent and expenses to the landlord, and he had taken it, and nothing more were done,—would the tenant have had a right of action?] For nominal damages, it is submitted, he would. [CRESSWELL, J.—What would be the form of action?] Trespass, for doing an act which the landlord had no right to do. [CRESSWELL, J.—Before the statute 11 G. 2, c. 19, there was no power to sell the distress. A special power is given by that statute. Suppose goods seized, and sold before the landlord has authority to sell,—is title conveyed to the purchaser? Or, does that give the tenant a right of action?] In the case of goods, the landlord has a right to sell at the expiration of five days: but he has no right to sell growing crops at all. [JERVIS, C. J.—What would you plead in trover, to raise this point,—to cut the plaintiff down to nominal damages?] There is no good reason why the plaintiff should not be entitled to substantial damages. [JERVIS, C. J.—He must be entitled to the whole damages, or to none.] In *Winterbourne v. Morgan*, 11 East, 395, where one who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the [*121

premises for fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress,—it was held, that, at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises, and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Proudlove v. Twemlow*, 1 C. & M. 326,† is precisely in point. [WILLIAMS, J.—Nobody ever suggested there that there was not a case for nominal damages.] Then, the fourth count states that the defendant, having distrained certain growing wheat of the plaintiff as a distress for rent, and having caused the said wheat to be cut, cured, and carried away, the defendant, instead of impounding, appraising, or selling the said wheat when cut, wrongfully permitted and caused certain persons to convert the said cut wheat to their own use, whereby the same was lost to the plaintiff, and the plaintiff was deprived of the overplus of money which he would have been entitled to if the said wheat had been sold by the defendant when cut, under the said distress. The “overplus” means, the overplus after all things done which should lawfully have been done. In the case of an escape and recapture, or where the sheriff has delayed the execution of process, even though no actual damage has resulted to the execution-creditor, he is still entitled to nominal damages: *Clifton v. Hooper*, 6 Q. B. 468 (E. C. L. R. vol. 51). Here, however, the tenant was entitled up to the last moment to the opportunity of tendering the rent. [JERVIS, C. J.—No such damages are stated in the count. *Hayes*, Serjt.—*Messing v. Kemble*, 2 Campb. 115, shows that the tenant is confined to the damages which he specifically states in his count. It was there held, that the true construction of the provision in the 11 G. 2, c. 19, s. 19, that the party may recover a compensation for the *122] special damage he sustains by an irregular distress “in an action of trespass or on the case,” is, that he must bring trespass, if the irregularity be in the nature of an act of trespass, and case if it be in itself the subject-matter of an action on the case. Lord Ellenborough said: “The statute provides that the party aggrieved by the irregularity of the distress shall recover satisfaction for the special damage he has sustained; but it provides that the distrainer shall not, by reason of any irregularity, be deemed a trespasser for such part of the conduct of the distress as is perfectly regular. It does not say that he shall be a trespasser for the irregularity, whether that consist in an act or omission, in nonfeazance or in malfeazance. The statute does not attempt to confound legal distinctions; but allows the injury done to the tenant to be a trespass or tort according to the nature of the irregularity, and gives the remedy of trespass or case according to the cause of action. Here, the distress was conducted with perfect regularity, except that the defendant omitted to have the goods appraised before they were sold. This omission was not a trespass, and the action is misconceived. The provisions and the object of 11 G. 2 would be entirely defeated, if this

mode of proceeding were permitted. The legislature intended that the landlord should be specifically informed of the irregularity of which the tenant complains; but, when the declaration states that the defendant with force and arms broke and entered the plaintiff's house, how can he know that the real complaint against him is, that he sold the goods before they were appraised? Even in trespass [case] for an irregular distress, it might be well if the plaintiff were to declare specially, and take up the grievance where his cause of action commences. But I am quite clear that the present action cannot be maintained." That was an action of trespass, which presents the same distinction *between [*123 an act in itself unlawful and a mere irregularity.

Our. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—

The question upon which the court took time to consider in this case arises upon the fourth and sixth counts of the declaration.

The fourth count states that the defendant, having distrained certain growing wheat as a distress for rent, and having caused the same to be cut and carried away, instead of impounding, appraising, and selling the same, suffered other persons to carry the same away and convert the same to their own use; whereby the plaintiff was injured, and was deprived of the surplus. The sixth count was in trover.

It was proved at the trial that the defendant seized the plaintiff's growing wheat as a distress for rent, and sold it on the premises in a growing state; that the purchaser cut the wheat, and carried it away; and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff.

The jury found that the plaintiff sustained no damage by this transaction; and my Brother Coleridge directed a verdict to be entered for the defendant.

Upon these facts, and upon this finding, the plaintiff contends that he is entitled at all events to nominal damages.

And, first, with regard to the count in trover, it is said that the landlord is bound, under the statute 11 G. 2, c. 19, s. 8, after distress made, to cut the corn, and to impound and appraise it before sale; and that, inasmuch as the corn was sold in this case when standing, the distress was void, and trover lies for the value of the thing taken. *Owen v. Legh*, 3 B. & Ald. 470 (E. C. L. R. vol. 5), and *Proudlove v. Twemlow*, 1 C. & M. 326,† are cited as authorities for this position: but, when examined, they do not support it. In *Owen v. Legh*, the plaintiff had recovered damages for the sale of growing crops distrained for rent, in a green state, before appraisement; and, as the sale was void, it was decided that the plaintiff had sustained no damage, and could not therefore recover. It was not held that the distress was void, but the sale merely; Abbott, C. J., saying,—“The sale being altogether void, the plaintiff sustained no legal damage from it, and has

therefore no ground of action in respect of it." Indeed, in *Proudlove v. Twemlow*, it was holden that the distress was originally lawful: but that the sale was unlawful and irregular. It is true that the court ordered the verdict to be entered for the plaintiff for nominal damages upon the count in trover, in that case: but the form of the rule compelled them to do so. The plaintiff had recovered substantial damages upon the count in trover; and the only rule was, to reduce those damages to 1s. The court could only make the rule absolute; though the grounds of their decision show that the defendant should have had a verdict upon the count in trover; for, as the plaintiff can only recover in that form of action, if there be a property in him, and also a right of possession, as well as a conversion of the goods by the defendant, the distress, being lawful, binds the property, and takes the possession out of the plaintiff, though the subsequent unlawful sale, if acted upon, may be a conversion of the goods, and prevents the plaintiff from recovering, because the subsequent irregularity does not make the landlord a trespasser *ab initio*. We think, therefore, that the plaintiff is not entitled to nominal damages upon the count in trover: see *Wallace v. King*, 2 H. Bl. 13, *Avenell v. Croker*, M. & M. 173 (E. C. L. R. vol. 22).

With respect to the fourth count, it is admitted that the sale and subsequent dealing with the corn was *irregular: but it is said that *125] no action will lie, because the corn sold for its full value, and the plaintiff sustained no injury.

This depends upon the proper construction to be put upon the 19th section of the 11 G. 2, c. 19. If it means that the plaintiff can only recover where actual damage is proved, the defendant is right: if it means that the plaintiff may always recover nominal damages for an irregularity, and also substantial damages where the case warrants it, the plaintiff is right. We think the former is the correct construction. A subsequent irregularity is not to make the distrainer a trespasser *ab initio*. For the original taking there is to be no action: the distrainer is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. But it may be said that he holds the goods with a special authority to deal with them in a particular way, and that he may be liable in case for abusing that authority, without treating him as a trespasser *ab initio*. This is true: but the act provides for that case, and says that the tenant shall recover for an irregularity full satisfaction for the damage, and *no more*. From these words, we think, that, where there is no special damage, there can be no satisfaction.

This appears to us to be the true construction of the statute: and, although we do not find that it has been so construed before, we are not aware of any authorities which are opposed to this construction.

In *Avenell v. Croker*, M. & M. 173 (E. C. L. R. vol. 22), Lord Ten-
terden said that the plaintiff under such circumstances would be entitled to nominal damages; and in *Proudlove v. Twemlow*, 1 C. & M. 326,†

the damages were reduced to 1s.: but, in the former case, the jury found for the defendants, and subsequently a *stet* process was entered; and, in the latter, the court were obliged by the form of the rule to decide as they did. The decision in *Biggins v. Goode*, 2 C. & J. 364,† proceeds upon the construction of the statute which we [*126 now adopt.

There is no doubt, however, that the practice of the profession has been, under such circumstances, to take a verdict for nominal damages: but that possibly is, because the point has not been raised.

It was further urged, in support of the ruling of the learned judge, that the fourth count was not proved: but we do not proceed upon that ground; because we think that the count was substantially proved, and that any variance which may exist, might have been cured by amendment at the trial.

For the reasons stated, we think the rule ought to be discharged.

Rule discharged.

REVIS v. SMITH. *April 29.*

No action lies against a man for a statement made by him, whether by affidavit or *viva voce*, in the course of a judicial proceeding, even though it be alleged to have been made "falsely and maliciously, and without any reasonable or probable cause."

THE second count of the declaration stated, that, before and at the time of the committing of the grievance by the defendant thereafter mentioned, the plaintiff carried on the business of an auctioneer, and a suit was then depending in the High Court of Chancery in which Emma Gardner, the wife of John Gardner, by John Cleaver Gardner, her next friend, and the said John Gardner, were plaintiffs, and the now defendant, and Harriet Frances, his wife, Sophia Smith, John Athawes, and Francis Gardner, James Gardner, Sophia Gardner, and Emma Gardner, were defendants, and an order of *the said Court of Chancery had been [*127 made in that suit, whereby it was, amongst other things, ordered that the said testator's real estate be sold subject to the mortgages, charges, and other encumbrances thereon, if any, unless the parties entitled to such mortgages, charges, or other encumbrances thereon, or any of them, were willing to join in such sale, in which case the sale was to be free from the mortgages, charges, or other encumbrances of such parties as should so consent; and, in that case also, the purchase-money affected thereby was first to be applied in discharge of such last-mentioned mortgages, charges, or other encumbrances according to their priorities; and, after the making of the said order, the plaintiff had been and was proposed by the plaintiffs in the said suit, to the said Court of Chancery, as a fit and proper person to be appointed by the said court to sell the said property so directed to be sold by the said order as aforesaid, and

such proposal was at the time of the committing of the grievance thereafter mentioned by the defendant pending in and before the said Court of Chancery in the said suit: Yet the defendant, *falsely and maliciously, and without any reasonable and probable cause*, made before a commissioner for taking oaths in the said Court of Chancery, and swore before him, a deposition or affidavit in writing in the said court, and in the said cause, containing the defamatory words following of and concerning the plaintiff as such auctioneer, and of his conduct in the said profession or business, that is to say, "Thomas Revis (meaning the plaintiff), of Olney, in the county of Buckingham, auctioneer, was introduced and recommended to me (meaning the defendant) by the above-named plaintiff John Gardner, in 1844, to offer for sale the said estates of Francis Smith, the testator in the pleadings named, which estates were valued *128] *6450*l.* for the purpose of determining the amount of duty to be paid upon the residuary estate of the said testator. The said plaintiff John Gardner took upon himself the management of the said sale, and fixed the amount of the reserved biddings with the said Thomas Revis (meaning the plaintiff), and the said estates were accordingly offered for sale by the said Thomas Revis (meaning the plaintiff) at Newport Pagnel, in the month of February, 1845, but no part thereof was then sold, by reason of the reserved biddings being fixed too high. The said Thomas Revis (meaning the plaintiff) had at one period a very considerable business as an auctioneer in the district in which he (meaning the plaintiff) resides; but I (meaning the defendant) have been informed, and believe it to be true, that his (meaning the plaintiff's) business has latterly very much decreased; and I (meaning the defendant) have been informed, and believe it to be true, that he (meaning the plaintiff) does not conduct his (meaning the plaintiff's) sales in a proper and fair manner, and his business (meaning the plaintiff's said business as an auctioneer) has decreased in consequence. I (meaning the defendant) have also been informed, and believe it to be true, that the said Thomas Revis (meaning the plaintiff) was guilty of fraud in the management of an estate at Little Billing, in the county of Northampton, which was intrusted to him (meaning the plaintiff) by this honourable court a few years since, and in which he (meaning the plaintiff) was connected with one George Pell, a solicitor carrying on business at Welford, in the said county of Northampton; and, in my (meaning the defendant's) opinion, the said Thomas Revis (meaning the plaintiff) is not a fit and proper man to be intrusted with the sale of the said testator's estates: and the defendant then *falsely and maliciously, and without any reasonable or probable cause* *129] whatsoever, filed and published in the said court *and cause, and to the parties therein, and to the said court, the said libellous deposition or affidavit of and concerning the plaintiff as such auctioneer, and of his conduct in his said business; whereby the said court was

induced to and did decline to appoint the plaintiff to sell the said property so ordered to be sold as aforesaid, in the way of the plaintiff's said business, as the said court otherwise might and would have done; and thereby the plaintiff lost the profits he would have made by being so employed, and was greatly injured in his good name and reputation, and in his said business: and the plaintiff claimed 500*l*.

The defendant demurred to the second count, the ground of demurrer stated in the margin being, "that the second count shows the publication therein complained of to have been one not actionable." Joinder.

Keane, in support of the demurrer.(a)—The *declaration is [*130 bad. The party making the affidavit is privileged, even though he may have acted maliciously or without reasonable and probable cause. The action is evidently founded upon the suggestion thrown out in the note to *Hodgson v. Scarlett*, 1 B. & Ald. 232, 245 (said by Alderson, B., in *Gibbs v. Pike*, 9 M. & W. 358,† to have been furnished by the late Mr. Justice Holroyd), that the proper form of remedy for words spoken or written in a course of justice, was, a special action on the case, in which it should be expressly charged that the imputation was made falsely, and without reasonable or probable cause. In that note the learned judge says,—“In the case of *Astley v. Younge*, 2 Burr. 807, the declaration charged that the defendant did *maliciously* make, exhibit, and publish to the Court of B. R. a *malicious, false*, and scandalous libel contained in an affidavit, in which there were certain *false, malicious, and scandalous* matters; and plea, that defendant made the affidavit in his own defence against a complaint made to the court against him for his refusal to grant an ale license, and in answer thereto, and to an affidavit of the plaintiff; general demurrer, and joinder: and, after argument, in the course of which the defendant's counsel urged that the plaintiff admitted the charge that the affidavit was made maliciously, judgment was given for the defendant. This is a strong authority to show that an action, as for defamation, although the words were *malicious*

(a) The points marked for argument on the part of the defendant, were,—“That defamatory matter relevant to the cause, published by a party to the cause, in the cause, and to the court and parties, is not actionable,—that, although the grounds of complaint declared on as causes of action are in their nature incidental to all litigation, this action is unsupported by precedent,—that, notwithstanding the averments of malice, failure of reasonable and probable cause, and damage, this action is unsupported by analogy,—that, in respect to the specific matter of litigation to which the defamatory matters complained of appear to have been applied by the defendant, the plaintiff must be considered as a party, or, at all events, not as a stranger to the cause,—that, if the alleged causes of action be true, an indictment for perjury is the appropriate remedy, and is not the less so because it is an imperfect remedy,—that the plaintiff had the opportunity of vindicating himself, and obtaining redress in the court and cause to and in which the defamatory matter complained of was published, and must be taken either not to have made, or to have failed in making the attempt,—and that this is an experimental action, the object of which is, to subject a decision of the Court of Chancery, on a matter within its jurisdiction, to the review of a court of common law, and to obtain by the verdict of a jury compensation in damages for the decision complained of from the party in whose favour the decision was, and that, to sustain this action, will be to subject all, or most, or some of the decisions of courts of competent jurisdiction, to virtual review by other and even inferior tribunals, and to supposed rectification in damages by a jury.”

ciously spoken or written, does not lie where they were spoken or written *131] in a course of justice. The case cited by Mr. Justice *Holroyd from 1 Roll. Abr. pl. 817 (which is also to be found in Sir W. Jones, 481,—*Boulton v. Clapham*,—and March, 20, pl. 45), is another authority to the same effect. The case as stated in Rolle is this: In an action on the case by A. against B., plaintiff declared that he took his oath in B. R. against B. of certain matters to bind him to his good behaviour, and thereupon B. then said *falsely and maliciously*, intending to scandalize the plaintiff, ‘there is not a word true in that affidavit, and I will prove it by forty witnesses.’ On motion in arrest of judgment (the jury having by their verdict found the words to be false and malicious), it was holden by the court that the action was not maintainable: and the reason given was, ‘that the answer which B. made to the affidavit was a justification in law, and spoken in defence of himself, and in a legal and judicial way.’ This case also shows that words, although false and malicious (if spoken in a course of justice), are not the subject of this species of action.” Notwithstanding the suggestion the learned judge threw out, no such action as this has been ventured on from that time to the present. The defendant here had an interest in the suit in the course of which the affidavit complained of was made. It was a matter of interest to him to have the sale conducted by a proper person. His affidavit, therefore, was relevant to the matter before the court; and he had a right to make it: and the court acted upon it. Could the defendant in *Hawker v. Seale*, which was disposed of by the court yesterday in this place, maintain an action against the witnesses for maliciously and without reasonable or probable cause giving the evidence which resulted in a verdict for the plaintiff, and so get a review of that decision which this court refused? If that were so, every motion in *132] this or any other court might furnish ground of action against *somebody. The law of France is opposed to the maintenance of actions of this sort. By the Code de la Presse, Ch. 6, art. 23, it is provided as follows:—“Ne donneront lieu à aucune action en diffamation ou injure, les discours prononcés ou les écrits produits devant les tribunaux: pourront, néanmoins, les juges saisis de la cause, en statuant sur le fond, prononcer la suppression des écrits injurieux ou diffamatoires, et condamner qui il appartiendra en des dommages-intérêts. Les juges pourront aussi, dans le même cas, faire des injonctions aux avocats et officiers ministériels, ou même les suspendre de leurs fonctions. La durée de cette suspension ne pourra excéder six mois; en cas de récidive, elle sera d’un an au moins et de cinq au plus. Pourront, toutefois, les faits diffamatoires étrangers à la cause donner ouverture, soit à l’action publique, soit à l’action civile des parties, lorsqu’elle leur aura été réservée par les tribunaux, et, dans tous les cas, à l’action civile des tiers.” In *Cutler v. Dixon*, 4 Co. Rep. 14 b, it was adjudged, “that, if one exhibits articles to justices of peace against a certain person, con-

taining divers great abuses and misdemeanours, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound to his good behaviour; in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of justice in such case: and, if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." So, in *Buckley v. Wood*, 4 Co. Rep. 14 b, it was resolved per totam curiam, "that, for any matter contained in the bill that was examinable in the said court [the Star-Chamber], no action lies, although the matter is merely false, *because it was in course of justice*:" and this agrees with the opinion in 11 Eliz. Dyer, 285, and with [*133 the judgment in *Cutler and Dixon's case*. 2. It was resolved and adjudged, that, for the said words *not* examinable in the said court, an action on the case lies; for, that cannot be in a course of justice." Reliance will probably be placed on the other side upon the averment of want of reasonable and probable cause, and special damage. In the case of an action for a malicious prosecution, not only is it necessary to show an absence of reasonable and probable cause, but the plaintiff must also show that the prosecution is determined, and determined in his favour. Here, the matter ended by a decision in favour of the defendant. In *Reynolds v. Kennedy*, 1 Wils. 232, cited in *Johnstone v. Sutton*, 1 T. R. 545, it was held, that, if the condemnation of goods for not entering and paying duty, by sub-commissioners, be reversed by the commissioners of appeal in Ireland, an action for a malicious prosecution does not lie against the informer, for, the judgment of the sub-commissioner shows that there was a foundation for the information and prosecution. There are numerous authorities to show that an action will not lie against a witness for giving false evidence in a court of justice; *Dampport v. Sympton*, Cro. Eliz. 520; *Weston v. Dobniet*, Cro. Jac. 432; per Houghton, J., in *Eyres v. Sedgewicke*, Cro. Jac. 601; *Harding v. Bodman*, Hutton, 11; or for making a false affidavit in Chancery or elsewhere; *Eyres v. Sedgewicke*, Cro. Jac. 601; *Boulton v. Clapham*, Sir W. Jones, 481, March, 20; *Astley v. Younge*, 2 Burr. 807; or for a false suggestion in letters patent; *Vincent de la Barre v. Cadwallader Jones*, Hardres, 221; or for prosecuting at the common law without cause; *Bray v. Patrid*, Cro. Eliz. 836. In truth, this is what the court in *Harding v. Bodman*, Hutton, 11, call "a new invention."

**J. Brown*, contrā. (a)—The plaintiff was no party to the suit in Chancery in which this libellous deposition was made: and, even [*134

(a) The points marked for argument on the part of the plaintiff were,—“That the deposition complained of, being admitted to be false, malicious, and made without any reasonable or probable cause, and containing imputations injurious to the plaintiff, and followed by damage, is actionable, although relevant to the cause in which it was made: That the plaintiff, being no party to the cause in which the deposition was made, and having no opportunity therein of vindicating himself, has a right to vindicate himself by this action from the charges made in the defendant's deposition: That a party to a suit has no privilege to use the written proceedings in

if he had been, he would have had no adequate remedy there for the wrong he has sustained at the defendant's hands: see *Smith's Chancery Practice*, 5th edit. p. 515. All that court could do, if the matter were irrelevant and libellous, would be, to order it to be taken off the file: *Williams v. Douglas*, 5 Bevan, 82. The most refined nation of antiquity, the Athenians, allowed an action at the suit of the injured party against a witness in a cause who gave false evidence: *Smith's Dictionary of Greek and Roman Antiquities*, 734. The circumstance of the slander being uttered in a court of justice, and upon oath, is rather an aggravation of the wrong. The law will never protect a man who, whether *vivâ voce* or by affidavit, states what is false and scandalous and malicious. The general rule as to privileged communications is thus stated in the judgment of Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181,† 4 Tyrwh. 582,—“In general, an action lies for the malicious *185] publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.” That passage has repeatedly been cited with approbation both here and in the Court of Queen's Bench: see *Coxhead v. Richards*, 2 C. B. 569 (E. C. L. R. vol. 52); *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70); *Taylor v. Hawkins*, 16 Q. B. 308 (E. C. L. R. vol. 71). It is not contended that the privilege of a witness giving evidence in a court of justice is quite so limited as that. The interests of society undoubtedly require a more extensive privilege than that, in favour of a witness. [WILLES, J.—Assuming you are right, does your declaration raise the question? Ought it not to have averred that the defendant knew the statement to be false, or that he did not believe it to be true?] Upon this declaration, it is submitted that the privilege of the witness is this, and no more: he may utter what is false, without being held responsible in an action; he may even utter it maliciously, and still not be responsible: but, if he utters it falsely and maliciously, *and without reasonable or probable cause*, he is responsible. In a declaration for maliciously holding a man to bail for an excessive sum, it was not usual to allege

It as a vehicle for libelling a stranger to the cause, where such libel is admitted to be not only false but malicious and without reasonable or probable cause: That there is no other remedy for the plaintiff for the wrong committed by the defendant, except this action; and that an indictment for perjury, if it would lie, would be no remedy.”

that the party *knowing* the *plaintiff to be indebted in a smaller sum, swore that he was indebted to him in a larger sum. It was [*186 not necessary to show that perjury had been committed. The like might be said of maliciously indicting a man for a crime. [JERVIS, C. J.—Do you say that the liability depends upon the relevancy or irrelevancy of the testimony? If made without reasonable or probable cause, the statement can have no relevancy to the action.] Be it ever so relevant, if it is false and malicious, and without reasonable or probable cause, it is actionable. [CRESSWELL, J.—Do you find a trace of authority to show that a man would be liable for a libellous statement in a declaration, though it be ever so false?] None. In the case of a civil action brought without reasonable cause, the law considering the costs a complete indemnity to the party injured: *Cotterell v. Jones*, 11 C. B. 713 (E. C. L. R. vol. 73). The cases cited on the other side all proceed upon a principle which has long since been overruled. Lord Coke, commenting upon the statute of Westminster 1,—3 Ed. 1, c. 34,—2 Inst. 228, says: “But it is to be understood, that, albeit this statute, and the said act of 2 R. 2, c. 5, be general in the negative, yet do they not extend to all manner of false news, or horrible and false scandals and lies, &c., for they extend only to extrajudicial slanders, &c. And therefore, if any man bring an appeal of murder, robbery, or other felony against any of the peers or nobles of the realm, &c., and charge them with murder, robbery, or felony, albeit the charge be false, yet shall they have no action *de scandalis magnat.*, neither at the common law, nor upon either of these statutes, for the bringing of his action, nor for affirming the same to his counsel, attorney, or cursitor, for the framing of his writ, or for speaking the same in evidence to a jury, or for using of those words for the necessary commencement or prosecution of his action judicially; and so it is in an action of *forger of false deeds, or any other action whatsoever; for, it is a maxim in law ‘Que home ne serra puny pur suer des briefes en court le roy, soit il a droit ou a tort;’ and the reason thereof is, that men should not be deterred to take their remedy by due course of law; and therefore the statutes never intended to prohibit the suing out of the king’s writs, and the proceeding thereupon: and so it is, if in the Star-Chamber a peer of the realm be charged with forgery, perjury, or the like; but,”—and this distinction runs through all the cases,—“if, in the bill the plaintiff charge him with felony, or any other offence not examinable in that court, that slander is within these statutes, for that the plaintiff pursueth not his charge in any judicial course, seeing the court hath no jurisdiction of the same: and so it hath been adjudged.” [JERVIS, C. J.—The authorities are conveniently brought together in Com. Dig. *Action upon the Case for Defamation*, (F 22.)] The case of *Cutler v. Dixon*, 4 Co. Rep. 14 b, proceeds entirely upon the principle just stated. And, as to *Buckley v. Wood*, 4 Co. Rep. 14 b, both

resolutions have been since overruled; for, it has long been held, that, in both the cases put, a man may have an action for a malicious prosecution. *Damport v. Sympson*, Cro. Eliz. 520, is directly contrary to the rule laid down in 2 Inst. 228; and the reason there given,—that “the defendant might be twice punished, viz., by the statute, and by this action,”—is clearly erroneous, and opposed to the principle of all the modern cases. There may be both a public and a private injury; and the civil remedy is only suspended. Lord Coke distinctly lays it down (3d Inst. 164) that perjury in a witness was punishable by the common law. The reasons assigned in *Ayres v. Sedgewicke*, Cro. Jac. 601, might with equal propriety be applied to one-half of the actions *188] for malicious prosecution, or *maliciously issuing a fiat in bankruptcy, or maliciously holding to bail: and the court were not unanimous. All those old cases, however, were virtually overruled when it was first held that an action might be maintained for a malicious prosecution. The earliest case probably on that subject is that of *Savile v. Roberts*, 1 Lord Raym. 374, 5 Mod. 894, 405, 1 Salk. 18, Carth. 416, 12 Mod. 208, Holt, 8, 150, 193, the judgment in which enunciates some very important principles. In *Goslin v. Wilcock*, 2 Wils. 302, it was held that an action lies for suing the plaintiff in an inferior court maliciously, and arresting him, when that court had no jurisdiction of the suit. Lord Camden there says: “There are no cases in the old books of actions for suing where the plaintiff had no cause of action; but of late years, when a man is *maliciously* held to bail where nothing is owing, or when he is *maliciously* arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due. Whenever this action is brought, the particular gravamen must be alleged in the declaration, and it must be laid that it was done *maliciously, and with an intent to injure and oppress.*” *Chapman v. Pickersgill*, 2 Wils. 145, was the first case of an action for maliciously suing out a commission of bankruptcy. [JERVIS, C. J.—Is it not conceded that an action lies for an injury resulting from the abuse of the process of the court, whether civil or criminal, without reasonable or probable cause?] These cases are only cited for the purpose of showing that the reasoning in the older cases relied upon by the other side is no longer applicable. In *Astley v. Younge*, 2 Burr. 807, the defendant was a party to the proceeding in which the alleged false affidavit was made. So also in *Lake v. *189] *King*, 1 Saund. 131 b. Between the case of a witness and that of counsel, there is a marked and palpable distinction; but, even in the case of counsel, it is by no means clear that he would not be liable for injurious words if not spoken *bonâ fide*, or express malice be shown: per Holroyd, J., in *Hodgson v. Scarlett*, 1 B. & Ald. 247. In the case

of False Affidavits, 12 Co. Rep. 128, it was resolved, "that perjury, by which damages do accrue, may be punished as a misdemeanour at the suit of the king; and also the party may have his action upon the case to recover damages, for, it should be a very great defect in the law, and encouragement to parties, if men may commit perjury with impunity." "In like manner it was agreed, that, if one make a false affidavit, by which the party is arrested and molested by process of contempt, he may have an action sur le case, and recover damages." [JERVIS, C. J.—That case merely shows that an action will lie for maliciously suing in an Ecclesiastical Court.] In *Coxe v. Smithe*, 1 Lev. 119, the plaintiff brought case, "for that, he being an officer of the Custom-House, the defendant made a false affidavit against him in Chancery touching malfeasance in his office, and afterwards petitioned the commissioners of the customs against him, and thereupon caused him to be turned out of his place. After a verdict (upon not guilty) for the plaintiff, it was moved in arrest of judgment, that no action lies for the making of a false oath,—(*Damport v. Sympson*), Owen, 158, (*Eyres v. Sedgewicke*), Cro. Jac. 601, (*Harding v. Bodman*), Hutton, 11, (*Simson v. Sanders*, cited in *Southern v. How*), Poph. 144, (*Jerom v. Knights*), 1 Leon, 107; and that no action lies for the petition, because it is done in a course of justice. But (said) by the court, the action is not founded on the oath, nor on the petition, but those are only inducements to prove the malicious procurement *to have him turned out of his place; and that it was falsely and maliciously done is now found by the verdict: [*140 and they gave judgment for the plaintiff." The question is, whether an action will not lie for a breach of the ninth commandment. [WILLES, J.—Will an action lie for a breach of the sixth or the eighth?] No: but it will for a breach of the seventh. It is said that the plaintiff, to entitle him to maintain this action, should show that the proceeding in which the alleged offence was committed has terminated in his favour. The analogy, however, fails, because here the plaintiff was no party to the cause. No principle of law or public policy prevents the maintenance of an action against a witness who trespasses beyond the line of truth.

Keane, in reply, was stopped by the court.

JERVIS, C. J.—I am of opinion that this action will not lie. Mr. *Brown* admits that the proceeding is somewhat novel. It is in truth entirely so, and, as I think, totally without principle or analogy to sustain it. So far as appears from the declaration, it is quite consistent that the defendant believed what he stated to be true; and we are called upon to punish him in a civil action for a statement made by him in the course of a judicial proceeding, which statement he believed himself to be justified in making, and had an interest in making. But, take the converse case. Mr. *Brown* says that the moment a witness swerves from the truth, an action lies against him at the suit of the party injured.

What would be the consequence of that? Why, that you would be trying him for perjury; and, by the testimony of one witness in a civil suit, you would be convicting a man of a crime of which he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two. By the general policy of the law, a witness is *141] privileged: and I see nothing to take this case out of the general rule. There is a manifest distinction between this and the cases relied on by Mr. *Brown*: in all of them the process of the court had been abused maliciously and without reasonable or probable cause. This is a case where a man is sought to be charged in an action for defamation in a statement made by him in the course of justice. I think it will be found that the law is correctly laid down in Mr. Justice Holroyd's note to the case of *Hodgson v. Scarlett*, and that in no case will an action for defamation lie under such circumstances. It is enough, however, upon the present occasion to say that this proceeding is totally without principle or example, and that there must consequently be judgment for the defendant.

CRESSWELL, J.—I entirely agree with my Lord. It is enough to say that the world has gone on very well without such actions as these; and I doubt whether it would continue to do so if such things were allowed. It would be highly inconvenient to hold a man liable where he gives evidence which is relevant to the cause. It is admitted that this action is without precedent. It certainly is not within any principle that I am aware of; and I am not disposed to introduce it.

CROWDER, J.—I am of the same opinion. This is an attempt to introduce an entirely new species of action,—in substance an action for defamation against a witness for giving evidence to the best of his belief in a court of justice. There is no averment that the defendant made the deposition knowing it to be untrue, but merely that he did it falsely and maliciously, and without reasonable and probable cause. It seems to me that the attempt is not supported either by authority or principle, or by any sufficient analogy.

*142] *WILLES, J.—I am entirely of the same opinion. This is an attempt to introduce a totally novel description of action. It has been likened to two actions which are maintainable. In the first place, it is put upon the same ground as an action for a malicious prosecution, which lies where one maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury. But this is altogether a different state of things: the action is not brought in respect of any damage which the plaintiff has sustained, or which has been brought about by means of the affidavit made by the defendant causing the plaintiff to be harassed by illegal proceedings. That is the class of cases referred to in the case of *False Affidavits*, in 12 Rep. 128. In general, an action for a malicious prosecution regularly instituted in a court having jurisdiction, is not maintainable unless

it is shown that the defendant was acting maliciously and without reasonable or probable cause, and that the plaintiff was acquitted.^(a) Here, the charge against the defendant is, that he falsely and maliciously, and without any reasonable and probable cause, went before a commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the defendant, in his character of auctioneer, that he conducted his business fraudulently and improperly, and that he was not in the deponent's opinion a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery: and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale. Further it is said that the action may be maintained, upon the ground that the affidavit contains matter that is slanderous in itself; and that, though *primâ facie* *privileged as being a proceeding in the course of justice, yet, [*148 inasmuch as there was malice in the mind of the defendant when he made the affidavit, and the statement therein was false, the action might be maintained. That, however, seems to me to be inconsistent with the authorities, because it is laid down, that, where the statement is *primâ facie* privileged, it rests upon the plaintiff to establish a case of express malice: it is not enough to show that it is defamatory and false. Does the plaintiff, then, show express malice here? He says the defendant maliciously made the affidavit; but he goes on to set out the facts; he alleges that there was no reasonable or probable cause for the statements contained in the affidavit; but he does not say that the defendant knew them to be false, or that he did not believe them to be true. Now, I apprehend the law to be, that, however harsh or hasty, or even untrue, may be the conduct of a person speaking on a privileged occasion, if he honestly and *bonâ fide* believes what he utters to be true, no action will lie: it is *damnum absque injuriâ*. In Fitzherbert's *Natura Brevium*, treating of the writ of conspiracy, which "lieth where two, three, or more persons, of malice and covin conspire and devise to indict any person falsely, and afterwards he who is so indicted is acquitted," it is said, p. 115 B, et seq.,—"A man shall have a writ of conspiracy upon an indictment before any mayor, bailiff of any city or borough, who have gaol delivery within the city or borough, if he be acquitted before them, &c., for that acquittal dischargeth him of the felony. But a writ of conspiracy doth not lie against the indictors, &c. If jurors be sworn to inquire, &c., and afterwards one of them be discharged by the justices, he shall not be punished for what he did when he was sworn: but, if he conspire after, he may be charged for the same in a writ of conspiracy. And *he who cometh into court, and discovereth [*144 felonies and is sworn to give evidence to the jury, is not chargeable in conspiracy." That seems to show that no action is maintainable

(a) But see *Payn v. Porter*, Cro. Jac. 499; 1 Roll. Abr. 112, pl. 9; *Jones v. Gwynn*, Gilb. 185; *Wicks v. Fentham*, 4 T. R. 247.

against a witness, though he speaks maliciously and falsely. It further appears that by the statute 5 Eliz. c. 9, which gave an additional remedy for perjury "in any matter or cause depending in suit," the party guilty of the offence not only was indictable, but also was liable to a *qui tam* action in which the party grieved recovered the sum of 20*l*. That is strong to show that the legislature thought that no action could be maintained but for the statute. No authority has been cited to bear out Mr. *Brown's* proposition: and I think it is clearly the duty of the court to check an attempt to introduce such a novelty.

Judgment for the defendant.

An action cannot be maintained for words uttered in the course of a judicial proceeding: *Vausse v. Lee*, 1 Hill (South Carolina), 197. An action of libel cannot be maintained for slanderous averments in a declaration in a cause: *Hardin v. Comstock*, 2 A. K. Marshall, 480. See *Hoar v. Wood*, 3 Metcalf, 193; *Suydam v. Moffat*, 1 Sandford Sup. Ct. 459; *Sanders v. Rolinson*, 2 Strobhart, 447; *Warner v. Paine*, 2 Sandford Sup. Ct. 195; *Bailey v. Dean*, 5 Barbour Sup. Ct. 297; *Garr v. Selden*, 4 Comstock, 91.

HURST v. USBORNE. April 17.

By a charter-party it was agreed that "the good ship the *Elizabeth*, A. 1," then bound to Havre, should with all convenient speed sail and proceed to the north of England for coals, and from thence proceed to Limerick, where the charterer engaged to put on board a full cargo of grain or other lawful merchandise for London. The charter-party contained the usual exception of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation." In consequence of sea perils, the vessel was so long delayed on her voyage to the north of England, that she did not arrive at Limerick until the grain export trade from that place was over, and she had in the mean time run out of her letter.

In an action against the charterer for not loading a cargo:—Held, that there was no warranty that the ship should continue A. 1,—that evidence as to the state of the corn trade at Limerick was irrelevant and inadmissible,—and that the exception as to the dangers of the seas, &c., was inapplicable.

THIS was an action for not loading a ship pursuant to the following charter-party:—

"London, September 22, 1854.

*145] "It is this day mutually agreed between Joel C. Hurst, *owner of the good ship or vessel called *The Elizabeth*, A. 1, of the measurement of 220 tons or thereabouts, now bound to Havre, and Messrs. Usborne and Son, of London, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to the north of England for coals, and from thence proceed to Limerick, or so near thereunto as she may safely get, and there load from the factors of the said affreighters a full and complete cargo of grain, or other lawful merchandise,—shippers finding mats, and the ship three timber bulk-heads and dunnage;

the cargo to be brought alongside, and taken from alongside, at merchants' risk and expense,—not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall proceed therewith to London, to discharge in the stream, or so near thereto as she may safely get, and deliver the same on being paid freight, say 2s. 8d. per quarter for oats, other grain, or goods in full and fair proportion, with 8½ per cent. primage thereon, and 2l. 2s. to the captain. The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage excepted. The freight is to be paid on unloading and right delivery of the cargo, in cash. Thirty-five running days are to be allowed the said merchant for loading and discharging the ship (if the ship is not sooner despatched), and ten days on demurrage over and above the said laying days, at 4l. per day. Penalty for non-performance of this agreement, 250l. Sufficient cash for ship's disbursements to be advanced at the port of loading, free of interest and commission, on account of freight, but subject to insurance. The ship to be addressed to 'charterers' [*146 agents at port of discharge, paying them 2 per cent.

(Signed) "J. C. HURST,

"For J. M. USBORNE, Limerick,
"USBORNE & SON."

The declaration, after setting out the charter-party, averred, that, afterwards, in pursuance of the said charter-party, the said ship sailed to and arrived at Limerick aforesaid, and that all things had happened, and had by the plaintiff been observed and performed, which, according to the said charter-party, were necessary to be observed and performed to have the said agreed cargo loaded on board the said ship; yet that the defendant made default in loading the said agreed cargo on board the said ship, whereby the plaintiff had not only been deprived of the agreed freight, but had also incurred expenses in and about the maintenance and pay of the crew of the said ship, and in and about the pilotage and harbour and other dues for and in respect of the said ship, upon the said voyage of the said ship to Limerick aforesaid, and during her stay there on the occasion aforesaid. And the plaintiff claimed 500l.

The defendant pleaded,—first, that the said ship did not, in pursuance of the said charter-party, sail to and arrive at Limerick as in the declaration alleged.

Secondly, that, at the time when the said charter-party was made, that is to say, on the 22d of September, 1854, the said ship was understood by both parties to be, and then was, in a port of the united kingdom, and that the said charter-party was made with reference thereto; that, in and by the said charter-party, *the said ship was described and warranted to be A. 1*, and to be bound to Havre and that the said ship

did not with all convenient speed complete her then voyage to Havre, *147] *and thence proceed to the north of England for coals, and from thence to Limerick, nor did she with all reasonable and convenient speed proceed to the north of England for coals, and thence to Limerick, according to the stipulation in the contract in that behalf; and, by reason thereof, the said ship arrived at Limerick long after a reasonable time for her to have so arrived according to the charter-party had elapsed, and long after the time when by the charter-party it was contemplated and expected that she would arrive at Limerick, that is to say, not till the 11th of April, 1855; and the voyage from Limerick to London, for which the plaintiff required the defendant to load the ship after such arrival, was a voyage at a different season of the year from that contemplated by the said charter-party, and was materially and substantially a different voyage from that contemplated by the said charter-party, and for which the said vessel was engaged thereby; *and the said vessel, during and through such improper and unreasonable delay, before she arrived at Limerick ceased to be A. 1, as she was warranted to be, wherefore the defendant refused to load her.*

Thirdly, that, in and by the said charter-party, it was represented and warranted that the said ship Elizabeth was A. 1, and that the said ship Elizabeth was not A. 1.

Upon each of these pleas the plaintiff joined issue.

The cause was tried before Jervis, C. J., at the sittings in London after last term. The facts were as follows:—At the time the charter-party was entered into the Elizabeth was at sea. She had met with bad weather shortly after leaving the Clyde, on the 2d of October, and was obliged to put into port, but at last arrived at Havre about the 23d of November. On the 26th of December she sailed from Havre, but met with an accident and put back to Havre, where she was detained until *148] the 31st, repairing. She left Havre again on that *day, and on the 2d of January, 1855, put into Ramsgate, where she remained until the 26th. Having left Ramsgate, the vessel, for some unexplained reason, put into Lowestoff on the 30th, whence she sailed on the 5th of February, and on the 12th anchored at Shields, where she loaded a cargo of coals on the 22d or 23d. On the 27th she proceeded to sea; on the 10th of March she arrived at Plymouth, and remained there till the 15th. She then proceeded to Falmouth, stayed there four days, and ultimately arrived at Limerick on the 1st of April. By this means two hundred and two days were consumed in a voyage which usually does not exceed fifty: but this delay was, under the circumstances, unavoidable. The defendant refused to load her.

On the part of the defendant, it was proposed to prove,—the charter-party being for a cargo of grain,—that the Limerick export trade only takes place in the winter months. It was also proposed to show, that, whilst the vessel lay at Ramsgate, she ran off her letter: and it was

insisted that the statement in the charter-party that she was A. 1 amounted to a warranty.

The Lord Chief Justice declined to receive the evidence, observing that it did not lie in the mouth of the defendant, who was complaining of the delay, to contend that the vessel should have been surveyed while at Ramsgate for the purpose of obtaining an extension of class: and he ruled that the statement in the charter-party that the ship was A. 1 did not amount to a continuing warranty, but was merely matter of present description, and applied only to the time of the charter.

The jury accordingly returned a verdict for the plaintiff, damages 200*l*.

James Wilde now moved for a new trial, on the ground of the improper rejection of evidence, and of misdirection.—The evidence offered on the part of the defendant *as to the period at which shipments of [*149 grain were usually made from Limerick, was clearly admissible. It was not offered for the purpose of contradicting or varying the terms of the written contract: but for the purpose of showing the intention of the parties in respect of a matter as to which the contract is silent. In *Ellis v. Thompson*, 3 M. & W. 445,† A., the proprietor of a lead mine called The Bog Mine, situate near Shrewsbury, sold to B., a lead merchant in London, by a written contract, “200 tons of Bog Mine lead at 22*l*. per ton, deliverable in the river Thames.” The broker who made the contract stated at the time, in answer to a question by B., that the lead was *ready for shipment*. A few days afterwards, B. applied to the broker to know whether A. would agree to allow the freight or insurance *from Gloucester or Liverpool*, to which A. agreed, but B. subsequently required the lead to be delivered in London. It appeared that Gloucester and Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of the transit by the lowness of the water, and, when it arrived in London, B. refused to receive it, the price having fallen considerably. In an action by A. against B. for not accepting the lead, B. pleaded that the plaintiff was not ready to deliver it within a reasonable time, on which issue was joined. The broker stated (in addition to the above facts) that he had understood from A. that the lead was at Shrewsbury. The learned judge stated to the jury that it might be taken for granted that the understanding of the parties was, that the lead was ready for shipment *at Gloucester or Liverpool*; that this was confirmed by the defendant’s application as to the freight and insurance; and that, if they thought it ought to have arrived *in [*150 a shorter time, if ready for shipment at Gloucester or Liverpool, the defendant was entitled to a verdict: and the court held that the parol representation of the broker that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one

of the data from which the reasonableness of the time was to be determined; and that the direction of the learned judge was warranted by the evidence. Then, the statement in the charter-party that the vessel was A. 1, it is submitted, amounted to a warranty. [CRESSWELL, J.—A warranty that she should continue to be classed A. 1, during the whole time covered by the charter-party?] A warranty to this extent at least, that she should not cease to be A. 1, through the plaintiff's default. [CROWDER, J.—It might be a warranty that the plaintiff would not actively do anything to make her lose her class, but not so as to make him responsible for mere nonfeasance.] This case somewhat resembles *Ollive v. Booker*, 1 Exch. 416.† There, to an action for not loading a vessel in pursuance of the terms of a charter-party, the defendant pleaded, setting out the whole of the charter-party, which stated, that it was agreed between the plaintiff, “original charterer of the good ship or vessel called *The Dove*, A. 1, of the measurement of 149 tons, or thereabouts, *now at sea, having sailed three weeks ago, or thereabouts*, and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the united kingdom, calling at Cork or Falmouth, for a certain rate of freight; thirty working days to be allowed, Sundays excepted. The plea then averred that time was an essential and material part of the contract; and the probable situation of the vessel with reference to the date of her sailing, and the object of her *151] voyage, *was also an essential and material part of the contract; and that, in point of fact, at the time of the making the charter-party, the vessel had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge; for which cause the defendant neglected and refused to load the vessel. It was held, that the time at which the vessel sailed was material, that that statement in the charter-party amounted to a warranty, and that the defendant was entitled to retain his verdict upon the plea, on motion for judgment non obstante veredicto. [JERVIS, C. J.—Suppose the vessel had been driven to a place where there was no opportunity of getting her surveyed so as to continue her classification, would that be a breach of warranty?] Possibly not; but that is a totally different case from this. [CRESSWELL, J.—Is this anything more than a description of the vessel?] It is a warranty that the vessel shall be an A. 1 ship at the time she should arrive at Limerick to receive her cargo. [CRESSWELL, J.—I think not.] Some analogy is presented by the case of *Sillem v. Thornton*, 3 E. & B. 868 (E. C. L. R. vol. 77). There, by a policy executed in London on the 7th of April, 1851, premises in California were insured from fire for a year from the 1st of February, 1851. The premises were described in the policy as “a brick building used as a dwelling-house and store (described in the paper attached to this policy).” The paper attached gave a minute description of a two-storied house,

with what purported to be a certificate that the description was accurate, signed on the 30th of October, 1850. The description was in fact accurate up to March, 1851; in which month the assured altered the house by adding a third story. This was unknown in London when the policy was signed. In May, 1851, the house, thus altered, was destroyed by fire. In an action on the policy, on a case [*152 stating the above facts,—it was held that the description in the policy amounted to a warranty that the assured would not during the term insured voluntarily do anything to make the condition of the premises vary from that description, so as to increase the liability of the assurer; that this warranty was broken; and, consequently, that the plaintiffs could not recover. Lord Campbell, in delivering the judgment of the court, said: “It would seem revolting to common sense, if we were to hold, that, as soon as Messrs. Godeffroy, Sillem & Co. had sent off the description to be shown to an insurance office or private underwriter, they might have added several stories to the house, and removed from it all the described safeguards against fire, and that, although the description misdescribed the actual state of the premises at the date of the policy, a fire afterwards happening, an indemnity might be claimed, for which the underwriter had received no adequate consideration. But this is the principle contended for by the assured. Not being told the exact progress which had been made in the alterations between the 26th of March and the 7th of April, we are to draw inferences from the facts stated; and we infer, that, on the seventh of April, the building no longer corresponded with the description of it in the policy, and that, by the alteration, the risk of the insurer had in some degree been increased. This also would be a bar to the present action. But we are further of opinion that the description in the policy amounts to a warranty that the assured would not during the time specified in the policy voluntarily do anything to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he *will agree to take the risk at all, and, if he does take it, what pre- [*158 mium he shall demand. The assured no doubt wished him to understand that not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable, if a loss should accrue. Without such an assurance and belief, the statement introduced into the policy, of the existing condition of the premises, would be a mere delusion.”

CRESSWELL, J.—I am of opinion that there ought to be no rule in this case. The first question is, whether evidence was admissible, which the Lord Chief Justice excluded, as to the mode in which the corn export trade at Limerick is carried on. Looking at the charter-party, I find it states that the ship, being tight, &c., shall with all convenient

speed sail and proceed to the north of England for coals, and from thence proceed to Limerick, and there load from the factors of the affreighters a full and complete cargo of grain, &c. I find nothing as to time, except what the law will imply, viz., that it shall be a reasonable time. The case of *Ellis v. Thompson*, 3 M. & W. 445,† seems to me to be wholly inapplicable. There, it was part of the implied contract, that the lead should be delivered within a reasonable time; and Lord Abinger appears to have received evidence of the representation of the broker who made the contract, that the lead was ready for shipment at Liverpool or Gloucester, and to have computed the reasonable time with reference to the supposed place of shipment. I think the state of the corn trade at Limerick had nothing at all to do with the question, and that the Lord Chief Justice was quite right in excluding the evidence. Then it is said that the delay in the sailing of *154] the vessel caused her to arrive *at Limerick in a state not to answer the description given of her in the charter-party, which, it is said, amounted to a warranty. It seems to me, however, that amounts only to a warranty of the state of the vessel with respect to her classification at Lloyd's at the time when the contract was entered into. It is part of the description of the vessel. If she answered the description at the time, there is an end of the warranty. On neither ground, therefore, do I think the defendant is entitled to a rule.

CROWDER, J.—I am of the same opinion. The statement in the charter-party that the *Elizabeth* was A. 1, applied, I apprehend, only to the time of entering into the contract. It clearly does not amount to a warranty that the vessel should continue A. 1 during the whole time covered by the charter-party, or that the owners would omit no act necessary to be done to retain her in that class. As to the other point, I do not see how the state of the corn market at Limerick could affect the question as to the reasonableness of time for the ship's arrival at that place. I think there is no pretence for saying that the proposed evidence on that subject was improperly rejected.

WILLES, J.—There is no stipulation in this charter-party that the vessel should continue A. 1. It is well known that vessels remain on that letter a certain time: and this charter-party is to receive the same construction as if it had been for a voyage round the world. It certainly would be a very strained construction of the description A. 1, to hold that, by so describing her, the owner undertakes that the vessel shall retain her class. Many cases might be supposed in which that would *155] be impossible. The charter-party being silent on the subject, *and it being impossible for the owner in many cases to do what is suggested, I am unable to adopt Mr. *Wilde's* argument. As to the other question, whether the construction of the charter-party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year,—the answer to that, I

apprehend, is, that the charter-party was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here, it is not stipulated that the vessel shall arrive at Limerick by any particular day; but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed to Limerick with all convenient speed when he has done all he could, but has been prevented by dangers of the seas. Some reliance was placed by Mr. *Wilde* upon the exception in the charter-party,—“The act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, *during the said voyage*, excepted:” and it was said that the defendant was excused by the delay arising from the act of God. That exception, however, is altogether inapplicable here. That which prevented the defendant from fulfilling his engagement was neither the act of God nor a danger or accident of the sea: because, though true it is, the arrival of the vessel at Limerick was retarded by dangers and accidents of the sea, yet there was no impossibility of loading a cargo at that place arising from those causes. The proximate cause was, not the dangers of navigation, but the fact that the vessel arrived at Limerick at a time when the particular description of cargo which the defendant wished to load *could not from local causes be obtained.^(a) For these reasons I concur [*156 with the rest of the court in thinking that there should be no rule.

Rule refused.

(a) See *Crow v. Falk*, 8 Q. B. 467 (E. C. L. R. vol. 55).

JOHN FOSTER, Appellant, The Rev. WILLIAM SMITH, Respondent. April 30.

A., as agent of B., sold a mare to C., and, having no express authority from B. to warrant her, refused to do so, but, at the time of the sale, told C., that, “if the mare was not all right, she was not his.” C. thereupon paid the price, which was received by B. The mare proving unsound, C. returned her to A., and sued B. in the county court for a return of the money.

The judge left the following questions to the jury,—1. Was the mare sound or unsound at the time of the sale?—2. Was there a warranty given by A. to C.?—3. Was the warranty given by the authority of B.?—4. When the mare was sent back to A. was she received by him for B. or for C.?

The jury answered the first and third questions in the negative, and the second in the affirmative; and, to the last, that the mare was not received back by A. on B.’s account.

The judge thereupon entered a verdict for B., the defendant.

The court directed a new trial, on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound.

The successful party on an appeal from a decision of a county court is entitled to the costs of the appeal.

THIS was an appeal against a decision of the county court of Cambridgeshire holden at Cambridge.

The action was for money had and received, and was brought to recover the price of a mare sold by the defendant to the plaintiff, and afterwards returned by the plaintiff, as not corresponding with the warranty.

The particulars of demand were as follows:—"The plaintiff claims 44*l.*, paid by him to Stephen Sparrow, the agent of the defendant, as the price of a mare, which mare was returned by the plaintiff, and accepted by the said Stephen Sparrow, as agent of the defendant, in accordance with the terms of sale."

The facts were as follows:—The defendant sent the mare in question to Mr. Stephen Sparrow, a veterinary surgeon at Cambridge, to be sold *157] by him for the *defendant, on the 25th of August, 1855. The plaintiff purchased the mare from Mr. Stephen Sparrow as the defendant's agent as above mentioned, for 44*l.* At the time of the sale, the plaintiff (according to his own evidence) said to Mr. Stephen Sparrow, "I suppose she is all right;" upon which Mr. Sparrow replied, "If there is anything not right, she is not yours; she belongs to the Rev. Mr. Smith, of Drayton, who is not the man to do anything wrong." Sparrow, in his examination for the defendant, denied that he gave this answer, alleging that he told the plaintiff that Mr. Smith never warranted a horse; it was his habit never to do so; but that he (Sparrow) believed the mare to be perfectly sound; and that, if he misrepresented her, he would take her back at any moment. Upon this the plaintiff purchased the mare, took her away a day or two afterwards, and on the 8th of September paid the price, 44*l.*, to Sparrow for Mr. Smith, and which, at the trial, Mr. Smith admitted to have received.

The plaintiff afterwards discovering (as he conceived) that the mare was unsound, applied to Sparrow to have her returned. After some negotiation, Sparrow consented to take her back, and she was accordingly returned to him on the 31st of October.

The evidence as to this part of the case was contradictory; the plaintiff alleging that Sparrow received the mare back for the defendant, and Sparrow stating that he did so in order to try to sell her for the plaintiff. There was no evidence that the defendant personally assented to or knew of the return of the mare, or that he personally took any part in the transactions between Sparrow and the plaintiff.

It appeared that Sparrow was not a horse-dealer: and there was no evidence that he was known or recognised as a general agent for the defendant, or that the plaintiff dealt with him in that character. He *158] had, however, on *previous occasions, sold horses for the defendant, to the number in all of six or eight.

The defendant stated in his evidence, that he had employed Sparrow fifteen years, and that he over and over again repeated to him that he (the defendant) never would warrant a horse, and that he (Sparrow)

never was to warrant a horse for him. But he admitted that he did not order that this particular mare should not be warranted.

The judge, in the course of his summing up to the jury, after commenting on the evidence as to the alleged unsoundness of the mare, and the warranty, told the jury, with reference to the question of Sparrow's authority to warrant, that, in particular trades, as, that of horse-dealers, &c., the rule was otherwise, but that, as regarded persons in general, the rule of law was, that, if a man employed another man as his special agent to sell a horse, and gave particular directions to the agent not to warrant, and the agent nevertheless, contrary to these directions, did warrant, the principal would not be bound; but that it would be otherwise if no such directions were given: that the present case was peculiar; for that here the defendant had stated (and, as his statement was uncontradicted, they must take it to be true) that he had on several previous occasions told Sparrow that he would never warrant a horse, and that he (Sparrow) was never to warrant a horse for him: but that, on the other hand, it was admitted by the defendant, that, on this occasion, he gave no particular directions that the mare should not be warranted: and that the jury would, therefore, weigh the circumstances, and consider whether the previous directions of the defendant were intended to have operation on the present occasion.

The judge then left four questions to the jury, which were severally answered by them.

First,—Was the mare sound or unsound at the time of *the sale? The jury found that the mare was unsound, and unfit for [159 the purposes for which she was bought.

Secondly,—Was there a warranty given by Sparrow to the plaintiff? The jury found that there was a warranty of soundness given at the time of sale.

Thirdly,—Was the warranty given by the authority of the defendant? The jury found that the warranty was not given by the defendant's directions.

The judge then, at the request of the counsel for the defendant, and with the consent of the counsel for the plaintiff, put the following question,—

Fourthly,—When the mare was sent back to Sparrow, was she received by him for the plaintiff or for the defendant? The jury found that she was received by Sparrow on the defendant's account.

The judge thereupon, considering the finding of the jury to be ambiguous, ordered the verdict to be entered for the defendant.

The plaintiff appealed against this decision, contending,—first, that an agent intrusted with a horse for sale, has an implied authority to give a warranty upon the sale of the horse, unless his principal expressly except and negative the authority to warrant; and that, consequently, it was in no way necessary that the warranty given by Sparrow should

have been given by the defendant's directions,—secondly, that there was no evidence that in this case the defendant did except and negative such authority; and that, consequently, in the absence of such evidence, it must be taken that the implied authority did exist, and, on the whole finding, the verdict ought to be entered for the plaintiff,—thirdly, that, in any case, the finding did not warrant the judge in directing the verdict to be entered for the defendant; and that, if there was any evidence from which the jury might have presumed that the ordinary implied authority to warrant was excepted and negatived in this particular case, *160] it ought to have been expressly submitted to them as a question, and they ought to have found whether or not in fact the defendant did so except and negative such authority; and that, if the verdict was not entered for the plaintiff, at any rate a new trial ought to be had.

The defendant contended that the decision of the judge was right in point of law.

The question for the opinion of the court was, whether on the findings of the jury to the above-mentioned questions respectively, the verdict ought to stand for the defendant, or to be entered for the plaintiff, or a new trial to be had.

Field, for the appellant.—Upon these findings, the judge of the county court ought to have entered a verdict for the plaintiff. The jury found that the mare was warranted. [JERVIS, C. J.—That would not entitle the plaintiff to return her, and sue for the price. And the finding upon the fourth question does not help that out. The judge should have left it to the jury to say whether it was part of the bargain that the mare should be taken back if unsound. The case must go down again.]

Collier (with whom was *G. Mills*), *contra*.—The defendant was clearly entitled to the verdict upon the findings of the jury upon the four questions submitted to them. The plaintiff brings his action upon the assumption that the contract was rescinded. There was no evidence that the defendant authorized Sparrow to make the special contract suggested. [JERVIS, C. J.—He received the money.] That would only operate a ratification of the sale, not of the condition. [JERVIS, C. J.—Then there was no consideration for the payment of the money, and the defendant ought to pay it back.] The only authority Sparrow had from the defendant was, to sell the mare without a warranty.

*161] JERVIS, C. J.—The proper question for the jury, was, whether it was part of the contract, that the mare should be returned, if she proved to be unsound. If so, and she were returned, there would be a failure of consideration, and the plaintiff would be entitled to recover back the price. The case must go down again. Although I regret the result, still it is satisfactory to know that the parties have justice at their own doors, and that it is cheap.

The rest of the court concurred.

Field asked for the costs of the appeal.

Collier, *contra*.—The respondent ought not to be visited with costs for the misdirection of the judge. Besides, the decision is not *reversed*; all the court does, is, to order a new trial.

JERVIS, C. J.—In *Gibbon*, App., *Gibbon*, Resp., 18 C. B. 205, 219 (E. C. L. R. vol. 76), after time taken to consider, and after conferring with my Brother Parke, we laid it down as an universal rule to give costs to the successful party; and there a new trial was directed. And in a subsequent case of *Liedemann*, App., *Schultz*, Resp., 14 C. B. 88, 52 (E. C. L. R. vol. 78), we acted upon the same principle, notwithstanding our attention was called to a case of *Mountney v. Collier*, 2 E. & B. 100 (E. C. L. R. vol. 75), where the Court of Queen's Bench had acted differently. I think it is expedient that this rule should be adhered to. And I think it is quite reasonable that the appellant, who is obliged to come here, should get his costs, if successful.

The rest of the court concurring,

Rule for a new trial, with costs.

*BURT v. HASLETT. April 22.

[*162

By indenture A. demised to B. a messuage and premises for twenty-one years. The lease contained a covenant to repair, and a covenant that B., his executors, administrators, and assigns should, at the determination of the term, yield up the premises to the plaintiff, his executors, &c., "together with all wainscots, windows, shutters, fastenings, &c., and other things which then were or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings, and improvements which should be erected, built, or made upon the demised premises, in good repair and condition."

An assignee of the lease, during the term, removed an old shop window, and put up in its place a plate-glass front, but without in any manner fastening it (except by means of wedges) to the premises:—

Held, that, whether an "improvement" within the meaning of the covenant or not, this plate-glass front was at all events a "window" belonging to the demised premises, and therefore that it could not be removed.

THE declaration stated, that theretofore, to wit, on the 1st of May, 1841, by a certain indenture then made between the plaintiff of the one part, and William Henry Hoggarth of the other part, and sealed, &c., the plaintiff demised and leased unto the said W. H. Hoggarth a messuage or tenement situate and being No. 7, Reform Place, Woolwich, in the county of Kent, together with the use, &c., &c., to have and to hold the same, with the appurtenances, unto the said W. H. Hoggarth, his executors, &c., for the term of twenty-one years, to commence from the 25th of March then last past (determinable as thereafter mentioned), yielding and paying therefore unto the plaintiff, his executors, &c., the clear yearly rent following, that is to say, during the first seven years of the said term the sum of 82*l.*, and during the next seven years of the

said term the sum of 34*l.*, and during the residue of the said term the sum of 38*l.*, the rent so from time to time payable to be paid quarterly, in four equal portions, on the 24th of June, &c., in every year, free and clear from all taxes, rates, or assessments, parochial or parliamentary, and without any deduction or abatement on any account whatsoever: and the said W. H. Hoggarth did thereby, for himself, his heirs, executors, &c., covenant with the plaintiff, his executors, &c., that he the *163] *said W. H. Hoggarth, his executors, &c., should and would at all times during the said demise well and truly pay, or cause to be paid, unto the plaintiff, his executors, &c., the said rent thereby reserved, as the same should become due, without any deduction or abatement thereout for taxes, rates, or otherwise howsoever; and also should and would once in every three years of the said term well and sufficiently paint, &c., and also from time to time and at all times during the said demise, at his and their own proper costs and charges, in all respects uphold, sustain, maintain, &c., and keep the said messuage or tenement and premises, and the said passage, &c., with all the walls, *glass windows*, pipes, gutters, watercourses, sinks, drains, sewers, and appurtenances, in, by, and with all and all manner of needful and necessary reparation and amendments whatsoever; and the same, being so sufficiently upheld, sustained, &c., and kept, should and would, at the determination of the said term, peaceably and quietly leave, surrender, and yield up unto the plaintiff, his executors, &c., *together with all wainscoats, windows, shutters, fastenings, hearths, and slabs, chimney-pieces, locks, keys, bolts, bars, and other things which then were, or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds, and other erections, buildings, and improvements, which should be erected, built, or made upon the said demised premises, in good repair and condition.*

The declaration went on to aver that Hoggarth entered by virtue of the said demise; that the demised premises came to and vested in the defendant, who entered into and upon the said demised premises, and became and continued so possessed thereof from thence until the expiration and determination of the said term. It then went on to aver, that, during the said term, and after the assignment to the defendant, to wit, *164] on the 25th of March, 1855, the sum of 8*l.* 10*s.* became and *was due and in arrear for a quarter's rent; that the defendant failed to repair the demised premises, but broke the said covenant in that behalf; that, after the assignment, and during the term, the defendant suffered and permitted a certain erection and improvement, to wit, *a certain plate-glass shop-front* (not being looking-glasses or furniture), which, during the term, had been erected, made, and set up, and was standing up and affixed to the demised premises, to be, and the same was, pulled down and prostrated, and the materials thereof wholly removed from off the said premises, and not left, surrendered, or yielded up unto

the plaintiff at the determination of the term, contrary to the form and effect of the said indenture, and the covenants therein contained in that behalf; and that, by reason of the said breaches of covenant therein-before mentioned, and of the said demised premises having been left in such bad order, repair, and condition as aforesaid, the plaintiff was prevented and hindered from demising or letting the same on such advantageous terms as he otherwise would have done, and the said premises had been useless and unproductive for a long time.

The defendant pleaded,—first, that the estate, right, title, and interest of Hoggarth in and to the said house and premises or term, did not come to or vest in him, the defendant, in manner and form as in the declaration was alleged.

Secondly, that he, the defendant, did not break the said covenant in the declaration mentioned, nor did he suffer or permit the said messuage or tenement, &c., with all the walls, glass windows, &c., and appurtenances, to become or continue ruinous or in great decay for want of needful upholding, &c., as in the declaration was alleged.

Thirdly, that he, the defendant, did not suffer or permit a certain erection or improvement, to wit, a *certain plate-glass shop-front, to be, nor was the same, pulled down or prostrated, nor were the [*165 materials thereof wholly carried from off the said premises, as in the declaration was alleged.

Fourthly, payment into court of 8*l.* 10*s.*

The plaintiff took issue on the first three pleas, and took out the 8*l.* 10*s.* in satisfaction pro tanto.

By an order of *Nisi Prius* it was directed that a verdict should be entered for the plaintiff for the claim in the declaration, but that such verdict should be subject to the award of a barrister, who was empowered to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and to whom the cause and all matters in difference between the parties were thereby referred, and who was to state any point of law for the consideration of the court which he might be required to do,—the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator; the arbitrator to be at liberty to postpone his decision as to the costs of the reference and award until after the determination by the court of any point of law raised by him, and his award to be referred back to him for his decision as to the said costs.

On the 13th of November, 1855, the arbitrator made his award, as follows:—

“I find that there are no other matters in difference between the parties to the said action than those which are in difference in the cause: And, as to the said action, I find the first issue for the plaintiff, and the second issue for the defendant; and, as to the issue taken on the third plea, I find that the defendant did suffer the plate-glass shop-

front in that plea mentioned to be pulled down, and the materials thereof to be wholly carried off from the premises: And, as to the issue taken on the last plea, I find and state the following facts, at the *166] *request of the parties to this reference, and for the purpose of raising a point of law for the consideration of the said court:—

“By indenture of demise dated the 1st of May, 1841, the plaintiff, being the owner of a house, No. 7, Reform Place, in Woolwich, in the county of Kent, demised the same for twenty-one years to one Hoggarth, who assigned it to one Wilson, who in 1846 assigned it to the defendant. The lease contained the following covenant, ‘That Hoggarth, his executors, administrators, and assigns, should uphold, sustain, maintain, tile, lead, pave, paint, purge, scour, cleanse, amend, and keep the said messuage, or tenement and premises, and the said passage, tank, pumps, and privy, with all the walls, *glass windows*, pipes, gutters, watercourses, sinks, drains, sewers, and appurtenances, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever; and the same being so sufficiently upheld, sustained, and maintained, tiled, leaded, paved, purged, scoured, cleansed, whitewashed, painted, amended, and kept, should and would, at the determination of the said term, peaceably and quietly leave, surrender, and yield up unto the plaintiff, his executors, administrators, or assigns, together with all wainscoats, *windows*, shutters, fastenings, hearths and slabs, chimney-pieces, locks, keys, bolts, bars, and other things which then were, or at any time thereafter should be, thereunto affixed or belonging (looking-glasses and furniture excepted), and together also with all sheds and other *erectations, buildings, and improvements*, which should be erected, built, or made upon said demised premises, in good repair and condition.’

“The defendant, after taking possession of the said house, carried on therein the trade and business of a linen-draper. From the time of his so taking possession, and up to March, 1850, there was in the house in *167] *question an ordinary shop sash-window, which, being unsuited to the defendant’s business, and unfit for the proper display of his goods, was removed by him, and a plate-glass shop-front or window substituted in its place. This plate-glass shop-front or window was brought to the house in question completely made, and then placed in its position, having above it the breastsummer of the house, below it the window-sill, and on each side of it the two story-posts. Several wooden wedges, about 2½ inches in thickness, were then inserted between the plate-glass front or window-frame and the story-posts, which had the effect of keeping the plate-glass front or window securely in its position. No screws, nails, or glue were used in fixing it in its place. When the wedges were withdrawn,—which could be easily done,—the plate-glass front or window could be lifted out of its place, and could be removed entire. Attached to the edge of the window-frame, and projecting a

little therefrom, ran a kind of wooden beading called a shutter-stop, which covered and concealed the wedges, and prevented the shutters from touching and injuring the plate-glass front or window-frame. This shutter-stop was not connected with the breastsummer, the story-posts, the window-sill, or with any part of the fabric of the building, but formed a portion of the plate-glass front or window itself. The intention of the defendant in fixing the plate-glass front or window in the manner above mentioned, was, to enable him to remove it when he should think proper. He removed it entire in March, 1854, and placed it in other premises belonging to him, and at the same time replaced in the plaintiff's premises the sash-window which he had previously removed as aforesaid, without thereby doing any injury to the plaintiff's premises.

"Plate-glass shop fronts or windows of the description *of the one in question are sometimes annexed to houses by nails or [*168 screws, and are sometimes confined in their places by wooden wedges.

"The value of the plate-glass front or window in question was 15*l*.

"If I am bound, as arbitrator, to find as a question of fact whether this plate-glass shop front or window was a *fixture* or not, or affixed to the demised premises or not, then I find as a fact that the said plate-glass shop-front or window was *not* a fixture, nor affixed to the demised premises.

"If the court shall be of opinion, on the facts above stated, that the said plate-glass front or window was set up or affixed to the said demised premises, and that the defendant was not entitled to remove it, then I find the issue taken on the last plea in favour of the plaintiff, and I direct that the verdict be entered for him on that plea, with damages 15*l*. But, if the court shall be of a contrary opinion, then I find that issue for the defendant: and I postpone my decision as to the costs of the reference and award until after the determination by the court of the point of law so as aforesaid raised by me."

R. E. Turner (with whom was *Hayes*, Serjt.), for the plaintiff.(a)—Upon the facts stated by the arbitrator in this case, the defendant had no right to remove the plate-glass front. It was a "*fixture*" within the meaning of the covenant. [CRESSWELL, J.—It is found as a fact that the shop-front was not *fixed*.] If not a "*fixture*," it was at all events an "*improvement*" within the terms *of the covenant. In *West v. Blakeway*, 2 M. & G. 729 (E. C. L. R. vol. 40), 3 Scott, N. [*169 R. 218, a lessee covenanted to yield up in repair at the expiration of his term all *erections and improvements* which should be erected, made, or set up during the term upon the demised premises. An assignee having during the term erected a green-house, the framework of which was no otherwise fixed to the walls thereof than by being laid thereon, embedded in mortar,—it was held that the removal of the sashes and

(a) The point marked for argument on the part of the plaintiff, was,—“That, according to the defendant's covenant, he was bound to leave the plate-glass front at the end of the term, and that the same was either a '*fixture*' or '*improvement*' within the meaning of the covenant.”

framework was a breach of the lessee's covenant, though no damage was done to the premises, and the walls and flues were left in a perfect state. The window here was clearly an "improvement," within the covenant. [CRESSWELL, J.—In *West v. Blakeway*, two of the judges, Coltman, J., and Erskine, J., held the green-house to be a fixture.] In *Martyr v. Bradley*, 2 M. & Scott, 25 (E. C. L. R. vol. 28), 9 Bing. 225 (E. C. L. R. vol. 28), the defendant occupied a mill as tenant to the plaintiff under a lease containing a covenant on the part of the tenant to deliver up the premises at the end of the term in good repair, "together with all locks, bolts, bars, and all other fixtures, fastenings, and *improvements*, that should at any time during the term be erected, set up, or fixed upon the premises:" and it was held that mill-stones set up by the tenant came within the term "improvements" in the covenant, and consequently could not be removed by him at the end of the term. Tindal, C. J., there says: "Whatever sense is given to the word '*improvements*,' it must necessarily be held to apply to those things that are affixed to the demised premises. Now, it is well known that the lower stone in a mill is fixed and cemented to the floor of the mill, and that the upper or running stone is also fixed to the upper part of the machinery. The stones, therefore, in the present case, must be taken to be *improvements* fixed to the demised premises. There are other words in the *170] lease that tend to show that the term '*improvements*' was not intended to be confined to improvements in the substantial parts of the building." [CRESSWELL, J.—The Lord Chief Justice there speaks of the stones as fixed to the freehold.] The window here was so fixed that it could neither have been taken in execution on a *fi. fa.*, nor distrained for rent.

Joyce, for the defendant.(a)—The finding of the arbitrator is conclusive in favour of the defendant. The covenant, after dealing with fixtures, proceeds,—“and together also with all sheds and other erections, buildings, and *improvements* which should be erected, built, or made upon the said demised premises.” “*Improvements*” there must be understood to mean something that is *ejusdem generis* with “erections and buildings.” The arbitrator finds that this front was put up by the defendant for the convenience of his trade, and with the intention of removing it when he should think proper. The subject of fixtures, and the right to remove them, underwent considerable discussion in a recent case in the Exchequer Chamber, *Bishop v. Elliott*, 11 Exch. 113.†

(a) The points marked for argument on the part of the defendant were,—“1. That the plate-glass front having been found not to be a fixture in point of fact concludes the plaintiff, as the question whether in point of law a thing is a fixture or not only arises when the thing is actually affixed, but for some reason is excepted out of the general rule that what is attached to follows the freehold,—2. That, if it is open to the plaintiff to say that the plate-glass front is in fact a fixture, it is a trade-fixture, and that trade-fixtures are not within the covenant,—3. That the covenant to surrender does not refer to a plate-glass front temporarily set up for the better display of trade goods, and that a plate-glass front is not an '*improvement*' within the meaning of the covenant, the word '*improvements*,' after the words '*erections and buildings*,' must mean improvements *ejusdem generis* '*erected, built, and made upon*' the demised premises.”

There, by indenture, C. demised to E. an *unfinished messuage for the term of ninety-seven years. The indenture contained a [*171 covenant by E., that, at the expiration of the term, he would deliver up the demised premises unto C., "together with all locks, keys, bars, bolts, marble, and other chimney-pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which should at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler, and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures. B. afterwards contracted with E. to purchase from him an under-lease of the premises, and the good-will, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, E. executed to B. an under-lease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in his lease; and it was held, on error, that the covenant above set forth did not restrain B., the lessee, from disposing either of the tenant's or the trade fixtures,—thus limiting the general words of the covenant to fixtures of the same kind and description that had been before enumerated. [CROWDER, J.—The language of the covenant as to fixtures is very comprehensive,—“together with all wainscots, windows, shutters, fastenings, hearths, and slabs, chimney-pieces, locks, keys, bolts, bars, and other things, which then were or at any time thereafter should be thereunto affixed or belonging, *looking-glasses and furniture excepted.*” The arbitrator finds that the defendant has removed a plate-glass shop-front or window.” This clearly is neither an “improvement” or a “window” within the terms of the covenant.](a)

*Turner was not called upon to reply.

JERVIS, C. J.—I am of opinion that the plaintiff in this case [*172 is entitled to recover, because I think the plate-glass shop-front in question was a “window belonging to the demised premises,” within the meaning of the covenant, and therefore not removable. It is true that this “window” was not so fastened to the premises as to be a fixture in the ordinary sense. But, suppose the tenant had removed the old window and had destroyed it, according to Mr. Joyce's argument the assignee would have been justified in leaving the premises without a window. I think the true meaning of the covenant is, that all windows which then were, or at any time thereafter should be, affixed or belonging to the demised premises, should be left for the lessor at the expiration of the term, however they might be placed there. I therefore think the plaintiff is entitled to the judgment of the court.

CRESSWELL, J.—I am of opinion, upon this finding of the arbitrator with reference to the last plea, that the verdict must be entered for the

(a) See *Wilde v. Waters*, 16 C. B. 637 (E. C. L. R. vol. 81).

plaintiff for 15l., because I think, with the Lord Chief Justice, that the shop-front in question was a "window" after the time of the demise belonging to the premises, and which by the terms of the covenant the defendant was bound to leave at the end of the term. Undoubtedly, it could not be said that this was a house without a window during the term.

CROWDER, J.—I am of the same opinion. Without stopping to consider whether the plate-glass shop-front was an "improvement" within the meaning of the covenant, or whether it was so fixed to the freehold *173] as to belong to the landlord, it seems to me to be "perfectly clear" that it is a "window" within the meaning of the latter part of the covenant, and one of those things which it is expressly provided shall be left to the landlord at the expiration of the term. The lessor is entitled to all windows, whether affixed or belonging to the premises at the time of the demise, or becoming affixed or belonging thereto at any time during the term.

WILLES, J., concurred.

Judgment accordingly.

KENDIL and Another v. MERRETT. May 27.

The form (No. 10) of the writ of execution, where matter of account is referred to and decided on by an arbitrator, officer of the court, or county court judge, as settled by the judges by the rule of Michaelmas Vacation, 1854, does not dispense with the signing of judgment or the obtaining a rule or order under the 1 & 2 Vict. c. 110, s. 18.

THIS cause and all matters in difference between the parties were referred to arbitration, the order professing to be made under the 17 & 18 Vict. c. 125, s. 8.(a) The arbitrator having made an award in favour of the plaintiff in the action, stating therein that there was no matter in difference brought before him other than the matters in difference in the cause, the plaintiff, *without signing judgment*, issued execution against the defendant in the form prescribed by the rules of court of Michaelmas Vacation, 1854,—14 C. B. 776 (E. C. L. R. vol. 78), No. 10.

Barnard, in Easter Term, obtained a rule nisi to set aside the writ of fi. fa., on the ground that the order of reference was by consent, and not made under the compulsory clauses of the 17 & 18 Vict. c. 125; *174] and that, if it were made under that statute, there was no "judgment to warrant the fi. fa., and no order under the 1 & 2 Vict. c. 110, s. 18.

Macnamara now showed cause.—This was a compulsory reference under the 8d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "if it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently

(a) See *Browne v. Emerson*, 17 C. B. 361 (E. C. L. R. vol. 84).

be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." The 7th section enacts that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed thereby or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order." The form of writ given by the rules of Michaelmas Vacation, 1854, No. 10, clearly was intended to authorize an execution, without going through the preliminary ceremony of signing *judgment. It is not competent to the defendant now to object that the order was by con- [*175 sent, or that it improperly embraced the matters in difference: if he had intended to raise that objection, he should have come earlier. The words of the statute do not necessarily show that a judgment should be signed on the award, as a means of enforcing it. And it clearly is for the benefit of all parties that the construction which has been adopted in all the courts, should be put upon the statute. [JERVIS, C. J.—It seems to be conceded that this was a hostile reference, and therefore the words "all matters in difference" should be struck out of the order.]

Barnard, in support of his rule.—The 7th section of the 17 & 18 Vict. c. 125, expressly enacts that the award made under the provisions of the 3d section shall be enforced in the same manner as upon a reference made by consent under a rule of court or judge's order. Now, it is clear that can only be by signing judgment or by obtaining an order or rule under the 1 & 2 Vict. c. 110, s. 18. As an universal rule, there must, except in cases provided for by the last-mentioned statute, always be a judgment to warrant the issuing of a *fi. fa.* [JERVIS, C. J.—What is the use of a judgment in such a case as this? The rules referred to were intentionally framed to dispense with judgment.] The plaintiff would be deprived of his remedy against the lands of the debtor, unless he might sign judgment. And it never could have been intended that he should have the option to sign judgment or not. Whatever the intention of the judges in framing the writs referred to, it is submitted they had no power to dispense with a judgment. [JERVIS, C. J.—You come here to set aside a *fi. fa.* which is in the form settled by the judges.] It is not the *form* of the writ that is objected to: the objection is, that the

*176] judges had not the power to *dispense with the signing of judgment, where the legislature has not thought proper to do so.

JERVIS, C. J.—This is a matter of sufficient importance to make it desirable that we should speak to the other judges before we dispose of it. If Mr. *Barnard's* argument is right, the form referred to has improvidently issued. It certainly was designedly so framed for the purpose of avoiding expense. Of course the words “all matters in difference between the parties,” which ought never to have been in the order, will be struck out.

Cur. adv. vult.

JERVIS, C. J.—Two objections were urged upon the argument of this rule,—first, that this was not a compulsory reference under the 17 & 18 Vict. c. 125, s. 3, because it included all matters in difference between the parties,—secondly, that the *fi. fa.* had improperly issued without a judgment to warrant it. We expressed an opinion at the time that the words “all matters in difference” had improvidently found their way into the judge’s order, and therefore that they should be struck out. The other question turned upon the proper construction of the 7th section of The Common Law Procedure Act, 1854, which enacts that the proceedings upon any such arbitration as aforesaid shall, except otherwise directed by the act or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge’s order. In framing the forms of writs, &c., necessary under that and other sections of the statute, the judges *177] proceeded *upon a notion that the *fi. fa.* should issue on a mere recital of the order and adjudication of the master or the arbitrator, and no more; and such has been the practice in all the courts. Upon consideration, however, we think that form is not warranted by the statute, and that, in order to proceed regularly on that statute, it is necessary either that judgment should be signed, or that an order should be obtained under the 1 & 2 Vict. c. 110, s. 18. We think the former the better course. It is manifest that there should be a judgment or something that could be registered: otherwise the plaintiff might have a *fi. fa.*, or an *elegit* to bind the lands of the debtor, with no means of registering it, so as to give notice to the world. The proper course is to sign judgment. The rule to set aside the *fi. fa.* will therefore be absolute: but, inasmuch as the writ was issued in conformity with the suggestion of the court, we think the rule for setting it aside should be made absolute without costs.

Rule absolute, without costs.

JOHN MAPLES, Appellant, WILLIAM PEPPER, Respondent.

April 22.

Ten years ago, A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago, A. permitted B. to make a communication through the party-wall, and to make other alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt; and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them:—

Held, that the “damages resulting from the non-compliance with the condition upon which the permission to alter was given,” did not constitute “a liability to pay money upon a contingency,” within the 178th section of the 12 & 13 Vict. c. 106; and that the condition or agreement above specified, to restore the premises to their previous state, was not a condition or agreement within s. 145.

THIS was an action brought in the county court at Nottingham to recover the sum of 22*l.*, under the following circumstances:—

*The plaintiff (below), about ten years ago, let to the defendant (below), from year to year, with a half-yearly notice, certain [*178 premises adjacent to a shop previously occupied by defendant.

About seven years ago, the defendant applied to the plaintiff for leave to convert the front of these premises into one large shop window, thus removing the street door, and making an entry through the party-wall into the old shop.

The plaintiff agreed to permit this, *upon condition that, at the determination of the tenancy, the premises should be restored by the defendant to their original state.*

Upon this footing, the alterations were effected; and the defendant continued in occupation until a petition for adjudication in bankruptcy was filed against him in April, 1855.

The messenger of the Court of Bankruptcy came into possession; and, on 17th of May, the defendant gave notice to the plaintiff that he would deliver up possession under s. 145 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106,—the assignees having declined upon the 12th of the same month.

The plaintiff subsequently met the defendant, and required him to perform the condition, which the defendant declined to do.

The plaintiff thereupon commenced this action, which is now taken, by direction of the judge, to be “for damages resulting from the non-compliance with the condition upon which the permission to alter was given.”

The defendant pleaded bankruptcy, and produced his certificate.

The judge decided that the plaintiff was entitled to recover.

The questions for the opinion of the court are,—whether the condition or agreement above specified, to *restore the premises [*179 to their previous state, be a condition or agreement within s. 145 of The Bankrupt Law Consolidation Act, 1849,—and whether, in case the court

should be of opinion that it is not, the bankrupt was discharged by his certificate, under s. 178 or under s. 200 of the same act.

If the court should be of opinion in the affirmative upon either of these questions, the judgment was to be entered for the defendant.

Merewether, for the appellant.—The 177th section of the 12 & 13 Vict. c. 106,—which in substance is a re-enactment of the 56th section of the 6 G. 4, c. 16,—enacts that, “if any bankrupt shall, before the issuing of the fiat or the filing of a petition for adjudication of bankruptcy, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat or the filing of such petition, the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.” That section was introduced for the purpose of meeting the case of *Toppin v. Field*, 4 Q. B. 386 (E. C. L. R. vol. 45), 3 Gale & D. 340, where a liability under a covenant to pay to the insurance office the premiums of insurance on a policy given to secure a debt, was held not to constitute a contingent *180] debt provable *under the 6 G. 4, c. 16, s. 56. The 178th section of the 12 & 13 Vict. c. 106, enacts, that, “if any trader who shall become bankrupt after the commencement of this act, shall have contracted, before the filing of a petition for an adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to *claim* for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that, where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the court shall think fit, be

expunged either in whole or in part from the proceedings." The first case which seems to have been decided upon that section, is, *Temple v. Pullen*, 8 Exch. 389.† There, the defendant having been in July, 1846, arrested under a ca. sa., in order to obtain his discharge gave to the attorney of the execution-creditor 5*l.* and a blank promissory note stamp with his name written on it: in May, 1851, the defendant obtained a certificate in bankruptcy (under the 12 & 13 Vict. c. 106), and *in October, 1852, the attorney filled up the blank stamped paper [*181 by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and endorsed it to the plaintiff for value: and it was held, that there was no claim provable under the fiat, and consequently that the certificate was no bar to an action on the note. Next came the case *Young v. Winter*, 16 C. B. 401 (E. C. L. R. vol. 81). There, A., being indebted to B., assigned to him a policy of assurance on his life, and covenanted to pay the annual premiums, and, in case he did not, and A. should pay them, he would repay him the amount with interest, on demand. B. afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by B., and A. having paid it, and not being repaid,—it was held that B. was not discharged, by virtue of the 12 & 13 Vict. c. 106, ss. 178, 200, from liability for the breach of the first of these covenants, but that he *was* discharged quoad the breach of the second covenant. No formal judgment was delivered in that case. But, in a subsequent case of *Warburg v. Tucker*, 5 E. & B. 384 (E. C. L. R. vol. 85), the Court of Queen's Bench took the same view as to *both* covenants that this court took as to the first covenant. In *Ex parte Barwis*, in re Strahan, 25 Law Journ. (Bankruptcy), 10, a joint and several covenant was entered into by a principal debtor and his surety, that the principal would pay a sum of money by three instalments, with interest, on three specified days. The first instalment was duly paid; but, before the second instalment became payable, the surety became bankrupt. The creditor applied to the commissioner (Evans) to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was allowed: and the Lords Justices, on appeal, held that the claim was properly admitted as upon a contingent liability under the 178th section of *the statute. Lord Justice Turner there [*182 said, "that, up to the time of the passing of the consolidation act, the law had made no provision for a proof in respect of contingent liabilities; and the 178th section was introduced into the act for the purpose of enabling claims founded on such liabilities to be worked out. That showed that it was the intention of the legislature to exonerate bankrupts, as far as practicable, from such liabilities, and it was the duty of the court to endeavour to carry into effect the intention of the legislature." And, referring to *Young v. Winter* and *Warburg v. Tucker*, he said, "He did not see how they could be reconciled; and, if

it were necessary to decide between them, he should prefer following *Young v. Winter*." The cases of *Boorman v. Nash*, 9 B. & C. 145 (E. C. L. R. vol. 17), and *Green v. Bicknell*, 8 Ad. & E. 701 (E. C. L. R. vol. 35), 3 N. & P. 684, are removed by the 178th section. [CROWDER, J.—What is the money demanded here?] Damages for not restoring the premises to their original state,—which are as susceptible of ascertainment as the damages in *Ex parte Bateman*, in re Routledge, 25 Law Journ. (Bankruptcy), 19. There, proprietors of saw-mills contracted to saw timber for a merchant, and to insure him against loss as to any timber that might be destroyed by fire. A fire took place, and the timber at that time at the mills was destroyed. The parties to the contract agreed as to the quantity and quality of the timber destroyed, and the merchant brought an action for the alleged value, and the saw-mill proprietors soon afterwards were adjudicated bankrupt. The merchant proceeded with the action, notwithstanding the adjudication, and recovered a verdict for the sum alleged to be the value, and tendered a proof for that sum before the commissioner, who rejected it, but recommended an appeal: and the Lords Justices held that the amount of the *183] loss was capable of being ascertained, and that the merchant was *entitled to prove, and with that declaration the matter was sent back to the commissioner. Lord Justice Turner, in answer to an objection there urged, that there could be no certain measure of damages, and referring to *Green v. Bicknell*, 8 Ad. & E. 701 (E. C. L. R. vol. 35), 3 N. & P. 684, and *Woolley v. Smith*, 3 C. B. 610 (E. C. L. R. vol. 54), says: "In each of those cases, there were other matters open to dispute besides the mere question of value: but, in the present case, I see nothing which can be open to dispute, except the mere question of value."

Then the next question is, whether the 145th section of the 12 & 13 Vict. c. 106, releases the bankrupt from the covenants he has entered into with his landlord. The section enacts, "that, if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and, if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable, if, within fourteen days after

he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; *and, if the assignees shall not (upon [*184 being thereto required) elect whether they will accept or decline such land or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit." The cases of *Slack v. Sharpe*, 8 Ad. & E. 366 (E. C. L. R. vol. 35), 3 N. & P. 39, and *Ex parte Hopton*, 2 M. D. & De G. 347, show that a parol lease is within this section, an offer to deliver possession being equivalent to delivery of the lease. But the question is whether the condition to restore the premises at the determination of the term to their original state, is a condition or agreement within the section. If this had been a lease or an agreement for a lease, no doubt the non-restoration of the premises would have been a breach: *Doe d. Dalton v. Jones*, 4 B. & Ad. 126 (E. C. L. R. vol. 24): and, if the assignees had taken to the premises, they would have been bound to perform the condition. [WILLIAMS, J.—Do you admit that the determination of the tenancy has arrived?] Upon the notice given under s. 145, it has.

H. James, *contrà*.—The claim in question, it is submitted, is barred by the 178th section of the 12 & 13 Vict. c. 106, and there was no debt provable under the bankruptcy. The contract was, not to pay any sum of money upon a contingency, but to restore the premises to their then condition, at the determination of the tenancy, if the landlord would permit the tenant to make certain alterations. For what could the plaintiff come in and prove? It is suggested that the amount provable would be, the *sum paid to the builder for reinstating the pre- [*185 mises. That, however, would not necessarily be so: it might be evidence of the measure of damages. The plaintiff might show the amount of damage by other evidence, even though he had not laid out a shilling; and it might be that he would be entitled to special damage by reason of the non-repair. It is not, like the value of an annuity, or the like, a matter of calculation. In order to fix the amount, the plaintiff would have to prove that the defendant had left the premises in their altered state, and that a certain amount of damages resulted therefrom. In the case of *Ex parte Bateman*, the quantity and quality of the timber had been ascertained: the sum due had also been ascertained by the verdict. Nothing of the sort occurs here: the whole remains to be ascertained, and can only be ascertained through the intervention of a

jury. It is difficult to distinguish the nature of the liability here from that which existed in *Temple v. Pullen*, 8 Exch. 889.† There, the defendant had, in July, 1846, been arrested under a ca. sa., and, in order to obtain his discharge, gave the attorney for the execution-creditor 5*l.*, and a blank promissory note stamp with his name on it: in May, 1851, the defendant obtained a certificate in bankruptcy; and, in October, 1852, the attorney filled up the blank stamped paper, by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and endorsed it to the plaintiff for value: and it was held that there was no claim provable under the fiat under either the 172*d.*, the 177*th.*, or the 178*th.* sections of the 12 & 18 Vict. c. 106, and consequently that the certificate was no bar to the action on the note. The only possibly distinction between that case and the present, is, the contingency existing there that the stamp should be filled up. In *Ex parte Todd*, *In re Williamson*, 24 Law Journ. (Bankruptcy) 20, before the filing of a petition for adjudication of bankruptcy, a verdict of 1000*l.* was obtained against a *186] trader in an *action of tort, subject to a reference as to the amount of damages to be paid; subsequently the petition was filed and the adjudication was made: the arbitrator afterwards made his award, fixing the amount of damages, the assignees taking no part in the proceedings: the plaintiff in the action signed final judgment, and applied to prove under the bankruptcy for the amount of certified damages and costs: and it was held by the Lords Justices,—overruling the commissioner's decision,—that this claim was not a “liability to pay money upon a contingency,” within s. 178, and that proof could not be admitted. And Lord Justice Turner said: “We must consider what the implied contract was. It was, to pay such sum as the arbitrator should award. There is no contingency in the contract, except the contingency of the arbitrator not making an award. I cannot say that it appears to me that the act has reference to a contingency of that description.” Then, the agreement to reinstate the premises clearly was not a condition or covenant within the meaning of the 145*th.* section. It was collateral to the demise: it was no part of the agreement under which the defendant occupied the premises: it was a subsequent independent bargain, not incorporated in the original terms of the holding. Though the words of the section would seem to show that the legislature contemplated the case of an agreement which could be “delivered up,” it cannot, after the case of *Slack v. Sharpe*, followed, as it has been, by subsequent decisions, be contended that it does not apply to an oral agreement. But it is submitted that this is not the case of a condition, covenant, or agreement at all, seeing that it was different as well in point of time as of subject-matter from the contract under which the defendant became tenant of the premises.

Merewether, in reply.—This might be considered to be a tenancy

renewed every year; and the agreement to *restore the premises to their original state would be incorporated in the renewed contract of tenancy for the year in which it was made. [*187 CRESSWELL, J.—If each year constituted a new tenancy, how would you make the defendant responsible to restore the premises in consideration of that re-letting?] It would, it is submitted, be a continuing liability year by year.

JERVIS, C. J.—I am of opinion that the respondent, the plaintiff below, is entitled to succeed. The first question is, whether the agreement to restore the premises to their original state at the determination of the tenancy, was a condition or agreement within the 145th section of the 12 & 13 Vict. c. 106. It seems to me that that question is answered by the facts pointed out by Mr. *James*. There was a subsisting tenancy. Then the parties entered into a new and independent agreement which forms the subject of this action. Without stopping to consider whether or not the case of *Slack v. Sharpe* was rightly decided, I think it is quite clear that the condition or agreement mentioned in the 145th section must be a contemporaneous agreement,—part of the terms of the demise: and there was none such here. Mr. *Merewether* contends that there was a new tenancy created year by year, and that the condition or agreement to restore might be considered as engrafted upon the agreement so made in the year in which the alterations were made. But, if that were so, there would be a subsequent new taking of the premises in their altered state.

As to the other question, I am clearly of opinion that the agreement to restore the premises did not give rise to a liability to pay money upon a contingency within the 178th section of the statute, but to a liability to restore the premises, or to give the plaintiff a compensation in damages, such as a jury might think him *entitled to, for a failure to perform the condition at the end of the tenancy. I [*188 think we cannot do better than follow the decisions of this court and the Court of Queen's Bench, in *Young v. Winter* and *Warburg v. Tucker*.

CRESSWELL, J.—I am of the same opinion upon both points. The contract to restore the premises to their original state formed no part of the agreement of letting, nor was it "a condition, covenant, or agreement in any lease or agreement for a lease," which would pass to the assignees if they had elected to take to the premises. It cannot, therefore, fall within the 145th section of the 12 & 13 Vict. c. 106. With regard to the other question, this clearly was not a liability to pay money upon a contingency which had not happened before the bankruptcy, within the 178th section. It was merely a liability to be called upon to repair the premises when the tenancy should be determined. I think, therefore, the plaintiff is entitled to retain his verdict.

CROWDER, J.—I also am of opinion that the condition or agreement

in question is not such a one as was contemplated by the 145th section, because, assuming that it may be by parol, the agreement must at all events come within the words "in any such lease or agreement for a lease." But for the case of *Slack v. Sharpe*, and those cases which have followed it, I must own I should have thought the condition, to satisfy that section, must be in some written document: but, at all events, it must be in the lease or agreement. I also think this is not a case of liability for the payment of money upon a contingency within the 178th section.

*189] WILLES, J.—I am of the same opinion. In order to *bring the case within the 178th section of the statute, the bankrupt must have contracted a liability to pay money upon a contingency which has not happened at the time of the issuing the fiat or filing the petition. Now, the liability here is, to restore the premises, at the determination of the tenancy, to their original state,—to reinstate a building in a certain form. It is true that the defendant, if he failed to perform his agreement, might be liable to pay money in the shape of damages. But, is that a liability to pay money upon a contingency? Certainly not. It is not a liability to pay money until it results in damages; and then it is a liability to pay money absolutely, and not upon any contingency. Then, is the case within s. 145? It is not; because the condition in question is not, within the language of that section, one of the conditions, covenants, or agreements *in the lease or agreement*. Assuming, as we are bound to do, that *Slack v. Sharpe* was rightly decided, the question is whether this agreement to restore the premises to their original state was one of the terms under which the tenant entered. It clearly was no part of the original contract of hiring. It was a contract under which the tenant was to do something which, if not permitted by the landlord, would amount to commissive waste. It is unnecessary to say more than that this was a collateral agreement which did not at all affect the terms of the holding. It somewhat resembles the agreement in *Donellan v. Read*, 3 B. & Ad. 899 (E. C. L. R. vol. 23), where a landlord who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work,—and it was held that the landlord, having *190] done *the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the statute of frauds. There is a similar case of *Harries v. Thomas*, 2 M. & W. 82.† So, here, the agreement as to the restoration of the premises formed no part of the terms of the tenancy. But Mr. *Merewether* ingeniously suggested, that, as the tenant continued to

hold the premises after that agreement was come to, the law might imply a new contract of tenancy, with the additional term introduced,—by analogy to the case of *Buckworth v. Simpson*, 1 C. M. & R. 834.† That, however, is assuming a term in the contract which has no existence, viz., that the holding on was a part of the consideration for the agreement that the tenant might alter the premises. No such contract can be implied. The whole consideration consisted in the assent of the landlord to the making of the alterations. For these reasons, I am of opinion that neither the 145th nor the 178th section of the 12 & 13 Vict. c. 106, has any application to this case.

Judgment accordingly.(a)

(a) As to costs, vide ante, p. 161.

*KOCH and GOGEL v. SHEPHERD. May 6. [*191

A. and B., bankers at Frankfort, sued C. on a bill of exchange which became due on the 2d of December, 1848. The defendant pleaded the statute of limitations; to which the plaintiffs replied, that, at the time of the accruing of the causes of action, they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years before the commencement of the action.

In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill and the year 1851; and that his partner, B., had never been in England. Upon cross-examination, he admitted that B. was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—

Held, that this was evidence to go to the jury; and that it was not necessary to call B. himself to negative his having been in England.

THIS was an action upon a bill of exchange for 35*l.*, drawn by the plaintiffs, who were bankers at Frankfort, upon and accepted by the defendant. The declaration, besides a count upon the bill, contained the common money counts.

The defendant pleaded the statute of limitations, to which the plaintiffs replied, that, at the time of the accruing of the causes of action, they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years next before the commencement of the suit. Issue thereon.

The cause was tried before Williams, J., at the second sitting in London in the present term. The facts were as follows:—The plaintiffs in 1848 advanced moneys to the defendant at Frankfort, for which he gave them the bill declared on, which became due on the 2d of December in that year. The action was commenced on the 1st of July, 1856.

In order to sustain the replication, the plaintiff Koch was called. He stated that he was not in England at any time during the years 1848, 1849, or 1850, nor until the year 1851, when he came to the great exhibition. He also stated that his partner, Gogel, had never been in England: and, when asked how he could know that, he said he was in the habit of seeing him almost daily, and he was certain that, if he

*192] *had* been *in England, he (the witness) must have heard of it. Upon cross-examination, he admitted that his partner was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month at a time; but still he had a moral conviction that he had never visited this country.

One Grainger, the London correspondent of the plaintiffs, who was also called, stated that he had not seen either of the plaintiffs in England between the 2d of December, 1848, and the year 1851; and that, if they or either of them had been here, he must have known it.

On the part of the defendant, it was submitted that there was no evidence to negative Gogel's having been in England between the maturity of the bill and the time of commencing the action.

The learned judge, however, thought otherwise, and the jury returned a verdict for the plaintiffs for the amount of the bill and interest,—leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to the jury.

Keane now moved accordingly.—Upon this evidence, there was nothing to justify the jury in finding that Gogel had not been in England. [JERVIS, C. J.—Why not? M. Gogel is a native of and resident in a foreign country. Why should it be presumed that he came to England? CRESSWELL, J.—How would the case have stood before the statute 14 & 15 Vict. c. 99, which first allowed the parties to the cause to be examined? Suppose a man were wandering about alone, without an attendant, he never could, according to your argument, have negatived the fact of his having been in England.] It is difficult to conceive the case of a man so entirely isolated from society as to be unable to prove his whereabouts. Here, the defendant was entitled to the *best* *evidence. [JERVIS, C. J.—What would be the best evidence in such a case?] The man himself. [JERVIS, C. J.—One man is as good as another. The rule as to the best evidence has nothing whatever to do with the case.] The evidence which was given really amounts to nothing. Koch admitted that his partner was in the habit of absenting himself for three or four days, and sometimes for a week or a month. For anything that appears, he might upon one of those occasions have come over to England. [JERVIS, C. J.—Suppose three actions were pending, one in England, one in Scotland, and one in Ireland, and the same plea and replication in each as here—would the absent partner be presumed to be in England, in Scotland, or in Ireland?] So far as concerns Gogel, it is submitted, the statement of Koch amounted to mere hearsay evidence. If Gogel had been called, he might have been cross-examined: or, he might have been examined under a commission. [JERVIS, C. J.—You say the man himself must always be called in support of such a replication as this. Suppose he were dead, would such evidence as this be sufficient to go to a jury?] In that case possibly it would be.

Per Curiam.—There is no pretence for a rule in this case. There was abundant evidence to go to the jury in support of the replication.

Rule refused.(a)

(a) See *Lafond v. Ruddock*, 13 C. B. 813 (E. C. L. R. vol. 76), and *Towns v. Mead*, 16 C. B. 123 (E. C. L. R. vol. 81).

*CHAPPELL and Others v. DAVIDSON. May 5. [*194

The first count of the declaration stated that a certain song of which the plaintiffs were the proprietors had been sung by a certain eminent singer at certain public concerts, and had acquired great popularity, and became in great demand; that the plaintiffs published it with a likeness of the singer on the outside leaf; and that the defendant, after such publication thereof by the plaintiffs, deceitfully and fraudulently, and without their consent, caused to be printed another song, the music, melody, and words whereof closely resembled the music, melody, and words of the plaintiffs' song, and with an outside leaf bearing the likeness of the same singer, and similar words to those of the plaintiffs' song, with the fraudulent intention of representing and inducing a belief that it was the song of the plaintiffs, and deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers thereof, under the false colour and pretence that it was the song so published by the plaintiffs; whereby the plaintiffs were injured in the sale of their said song.

The second count was substantially the same, but limited to the piratical use of the title-page and devices on the outside leaf of the plaintiffs' song.

The third count stated that the plaintiffs were the proprietors of the copyright in a certain book, and that the defendant, without their consent in writing, wrongfully and injuriously printed for sale divers copies of the said work, contrary to the form of the statute in such case made and provided, whereby the plaintiffs' profits were lessened.

The fourth count charged the defendant with "having in his possession for sale, and selling," divers copies of the work so unlawfully and without the consent of the plaintiffs printed.

The defendant pleaded,—to the whole declaration,—that the song in question was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, in violation of the statute 2 & 3 Vict. c. 12:—

Held, that the plea disclosed no defence as to the charges in the third and fourth counts; and *seem* that it could not be taken distributively.

Quære, whether the third and fourth counts were bad for not showing that the alleged infringement of copyright took place in England?

Quære, whether the want of an allegation in the third and fourth counts, that the copyright had been registered at Stationers' Hall, pursuant to the 5 & 6 Vict. c. 45, s. 24, was an answer to the action?

Seem, that the non-registration should at all events have been pleaded.

THE first count of the declaration stated, that, whereas a song named "Minnie," of which the plaintiffs were the proprietors, had been sung at certain public concerts in London, called Jullien's Concerts, by a certain eminent singer named Madame Anna Thillon, and had acquired great popularity, and became in great demand with the public; that thereupon the plaintiffs, in the course of their trade and business as music sellers and music publishers, carried on by them under the name and style of "Julien & Co.," so being the proprietors of the said song, printed and published copies of the same, on the outside leaf of which they caused to be *printed the said name "Minnie," and below the said name to be [*195 engraved a likeness of the said Madame Anna Thillon, and the words "Sung by Madame Anna Thillon at Jullien's Concerts" to be printed at the foot of the said likeness, so as to denote, and by which said outside leaf so printed and engraved it was denoted to, and under-

stood by, the public, that the said song so printed and published by the plaintiffs was the same song which had been so sung by the said Madame Anna Thillon at the said concerts: that the plaintiffs, in the course of their said trade and business, sold great numbers of copies of the said song so printed and published by them with such outside leaf as aforesaid: Yet that the defendant, well knowing the premises, after the said publication by the plaintiffs of the said copies of the said song, deceitfully and fraudulently, and without the consent of the plaintiffs, caused to be printed a certain other song, the music, melody, and words whereof closely resembled and imitated the music, melody, and words of the said song so published and sold by the plaintiffs, and on the outside leaf whereof the words "Minnie, dear Minnie," were printed by the defendant as the name of the said song, and below the said words a likeness of the said Madame Anna Thillon was engraved, and also the words "Madame Anna Thillon" printed by the defendant on the said outside leaf, beneath the said likeness; the said song and the said outside leaf thereof being so printed and engraved by the defendant, with the fraudulent intention that the said outside leaf thereof should be similar in appearance to, and represent, and should be understood and supposed by the public to be, the said outside leaf of the said song of the plaintiffs, and that the said song itself should represent, and be understood and supposed by the public to be, the said song of the plaintiffs: *196] and the defendant deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers of the said song so printed by him, and with such outside leaf so printed and engraved as aforesaid, the said outside leaf and song being so calculated and likely so to mislead, and in fact misleading, the public as aforesaid, under the false colour and pretence that the same was the said song so printed, published, and sold by the plaintiffs as aforesaid; the said outside leaf of the said song of the defendant, and the said song itself, being in fact calculated and likely to mislead, and in fact misleading, the public to suppose and believe that the said outside leaf and the said song were the outside leaf of the said song of the plaintiffs, and the said song itself of the plaintiffs; by reason whereof the plaintiffs had been hindered and prevented from selling many copies of their said song which they would otherwise have sold, and had lost great profits thereby, and many persons believed that the said song so published by the defendant was and is the song so published by the plaintiffs.

The second count stated that the plaintiffs, being such music sellers and music publishers as in the first count mentioned, and being proprietors of the said song, and so sung by the said Madame Anna Thillon as therein also mentioned, caused the same to be printed with the outside leaf thereof containing the said word "Minnie," the said engraving, and the said words at the foot of the said engraving, as in the first count was more particularly described; that the plaintiffs, in the way of their

said trade and business, published and sold great numbers of copies of the said song so printed by them, with such outside leaf as aforesaid, and acquired great profits by the sale thereof: Yet that the defendant, well knowing the premises, after the publication of the said song by the plaintiffs, deceitfully and fraudulently, and without the consent of the plaintiffs, caused a certain other song to be *printed with an outside leaf containing the words "Minnie, dear Minnie," at the top [*197 thereof, and a likeness of the said Madame Anna Thillon engraved on the said outside leaf immediately beneath the said words, and also the words "Madame Anna Thillon" printed at the foot of the said likeness, the said outside leaf being so printed and engraved by the defendant with the fraudulent intention that the same should be similar in appearance to, and represent, and should be understood and supposed by the public to be, the said outside leaf of the said song of the plaintiffs, and that the said song so printed by the defendant should be understood by the public to be the said song of the plaintiffs, the said outside leaf of the said song of the defendant being in fact calculated and likely to mislead: and in fact misleading the public to suppose and believe that the said outside leaf and the said song were the outside leaf of the said song of the plaintiffs, and the said song itself of the plaintiffs; and the defendant, deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers of copies of the said song so printed by him with such outside leaf as aforesaid, and so calculated and likely to mislead and in fact misleading the public as aforesaid, under the false colour and pretence that the same was the said song so printed, published, and sold by the plaintiffs as aforesaid: by reason whereof the plaintiffs had been hindered and prevented from selling many copies of their said song, which they would otherwise have sold, and had lost great profits thereby, and many persons believed that the said song so published by the defendant was and is the said song so published by the plaintiffs.

The third count stated that also before and at the time of committing the grievances thereafter mentioned, the plaintiffs were and still are the proprietors *of a then and still subsisting copyright in a certain book intituled "Minnie;" yet the defendant, well knowing [*198 the premises, wrongfully and injuriously, and without the consent in writing of the plaintiffs, so being such proprietors as aforesaid, printed for sale divers copies of the said book, and of portions of the said book, contrary to the form of the statute in such case made and provided; whereby the profits of the plaintiffs in their said copyright therein had been and were greatly lessened.

The fourth count stated that also, before the committing of the grievances thereafter mentioned, divers copies of the said book, and of portions of the said book, had been unlawfully, and without the consent in writing of the plaintiffs, so being such proprietors as last afore-

said, printed for sale by some person to the plaintiffs unknown; yet the defendant, well knowing the premises, without the consent in writing of the plaintiffs, so being such proprietors as aforesaid, had in his possession for sale, and sold, divers copies of the said book, and of the said portions of the said book, which had been so unlawfully printed as aforesaid, contrary to the form of the statute in such case made and provided: whereby the profits of the plaintiffs in their said copyright had been greatly lessened. And the plaintiffs claimed 500*l*.

The defendant pleaded to the whole of the declaration (tenthly), that all the copies of the said book or song intituled "Minnie," in the declaration mentioned, when printed by the plaintiffs, as in the declaration mentioned, were meant and intended by the plaintiffs to be published and dispersed, and were printed, published, and sold by the plaintiffs, as in the declaration mentioned, after the making and passing of a certain act of parliament made and passed in a session of parliament holden *199] in the second year of the reign of her present Majesty, *for amending an Act of the thirty-ninth year of King George the Third, for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices, and to put an end to certain proceedings then pending under the said act; that each and every of the said copies of the said book or song was a printed paper or book within the true intent and meaning of the said act of the second year of the reign of her said Majesty, and that each and every of the said copies of the said song consisted of more than one leaf, and was printed on more than one side; that there never was printed upon the first or last leaves of the said copies of the said song, or of any or either of them, in legible characters, the name of the printer of the said copies of the said song, or of any or either of them, or the usual place of abode or business of the printer of the said copies of the said song, or any or either of them; that none of the copies of the said song were printed at the University Press of Oxford, or the Pitt Press of Cambridge; and that the plaintiffs published and sold the said copies of the said song as in the declaration mentioned, without the name or usual place of abode or business of the person printing the same being printed thereon as aforesaid, and with full notice and knowledge of the premises in that plea mentioned.

The plaintiffs demurred to the tenth plea; the ground of demurrer being, "that the plea discloses no defence to this action, and, at all events, not to the third and fourth counts of the declaration." Joinder.

Montague Smith (with whom was *R. E. Turner*), in support of the *200] demurrer.(a)—The third and fourth *counts do not, and need not, aver any printing; the plea, therefore, as addressed to those

(a) The points marked for argument on the part of the plaintiffs, were as follows,—

"1. That the plea is no answer to the third and fourth counts, as no printing is alleged or implied in those counts; or, if it is, it is quite consistent with those counts, and with the plea,

counts, is clearly repugnant on the face of it. [JERVIS, C. J.—As to those counts, the plea clearly will not do.] The first and second counts are good, and the plea is no answer to them. [JERVIS, C. J.—The plea must be good for the whole, or it is bad altogether. *Bovill* intimated that he did not mean to object to the first and second counts, but to contend that the plea was a sufficient answer to those counts, and that the third and fourth counts were bad, for not averring that the alleged infringement took place in England.] The 15th section of the 5 & 6 Vict. c. 45, enacts, “that, if any person shall, in any part of the British dominions, after the passing of this act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book, so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such *copyright, to be brought in any court of [*201 record in that part of the British dominions in which the offence shall be committed: provided always, that, in Scotland, such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.” It is enough to aver, as is averred here, that the defendant wrongfully and injuriously, and without the consent in writing of the plaintiffs, so being proprietors, printed the book, contrary to the form of the statute, in such case made and provided. It is the common form of declaring. It was not necessary to allege that the infringement took place in England. It is only in the case of an action in an inferior court that it need be alleged that every material fact took place within the jurisdiction. The court will not assume that the infringement took place out of England. [*Bovill* here intimated that he meant also to object that the third and fourth counts omitted to aver that the plaintiffs’ copyright was registered pursuant to s. 24, which enacts “that no proprietor of copyright in any book which shall be first published after the passing of this act, shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or pro-

that the piracies complained of were committed by the defendant before such printing by the plaintiffs; and that the plea, being bad in part, is wholly bad.

“2. That the ‘song’ mentioned and described in the declaration, is not a paper or book within the meaning of the 2 & 3 Vict. c. 12.

“3. That, supposing it to be a paper or book within the meaning of the statute, the neglect of the plaintiffs to comply with the provisions of the statute affords no defence to this action.”

ceeding, have caused an entry to be made in the book of registry of the stationers' company, of such book, pursuant to this act: provided always, that the omission to make such entry shall not affect the copyright in any book, *but only the right to sue or proceed in respect of the infringement thereof as aforesaid.*"] It clearly was not necessary for the plaintiffs to aver in their declaration that the copyright was registered under that section. If the plaintiffs had omitted to comply with the statute *202] in that respect, the defendant might have shown that by his plea. [CRESSWELL, J.—You liken it to the case of a plea of the non-delivery of an attorney's bill?] Yes. The last two counts being good, the plea, being addressed to the whole declaration, and not being in its nature distributive, is a bad plea: *Gabriel v. Dresser*, 15 C. B. 622 (E. C. L. R. vol. 80).

Bovill (with whom was *Tapping*), contra. (a)—The defendant does not contend that the first two counts are bad. And it is not pretended on the other side that the plea is not a perfectly good answer to those counts. They are founded, not on a claim of copyright, but of trade-mark, or trade-title. The answer set up by the plea is, that the plaintiffs have printed the work in an illegal form,—a form prohibited by a general act of parliament, and upon grounds of public policy. The 39 G. 3, c. 79, which first required the printer's name to be affixed to books, &c., recites the object of the act to be the suppression of seditious and treasonable societies, and by ss. 23 et seq. enacts some very stringent *203] regulations as to printers, and amongst them the 27th section provides, "that any person who shall print any paper or book whatsoever which shall be meant or intended to be published or dispersed, whether the same shall be sold or given away, shall print upon the front of every such paper if the same shall be printed on one side only, and upon the first and last leaves of every paper or book which shall consist of more than one leaf, in legible characters, his or her name, and the name of the city, town, parish, or place, and also the name (if any) of the square, street, lane, court, or place, in which his or her dwelling-house or usual place of abode shall be; and every person who shall omit so to print his name and place of abode on every such paper or book printed by him, and also every person who shall publish or disperse, or assist in publishing or dispersing, either gratis or for money,

(a) The points marked for argument on the part of the defendant, were,—

"1. That the plea discloses a good defence to the several counts of the declaration, inasmuch as it shows that the song the infringement of the supposed property in and alleged rights relating to which the several counts complain of, was unlawfully printed, published, and sold, in violation of the provisions of the 39 G. 3, c. 79, 51 G. 3, c. 65, and 2 & 3 Vict. c. 12; and that the plaintiffs were privy and party to that illegality, and are consequently unable to maintain any action for infringement of any supposed property in or rights relating to the said song.

"2. That the first and second counts are bad in substance, as not showing any copyright in the said song, nor any other rights therein or relating thereto which the acts of the defendant complained of in those counts could have infringed; and that all the acts complained of in those counts were acts which he the defendant might lawfully do, and for which the plaintiffs could maintain no action, even though they may have been damaged thereby."

any printed paper or book which shall have been printed after the expiration of forty days from the passing of this act, and on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall, for every copy of such paper so published or dispersed by him, forfeit and pay the sum of 20*l*." The 51 G. 3, c. 65, limits the liability of the offender to twenty-five penalties or forfeitures in respect of the same paper or book. The 27th section of the first-mentioned act was repealed by the 2 & 3 Vict. c. 12, which, however, by s. 2, imposed a penalty of 5*l*. per copy for every omission to print the name and place of abode of the printer on *the first or the last* leaf of every paper or book. In *Bensley v. Bignold*, 5 B. & Ald. 335 (E. C. L. R. vol. 7), it was held that a printer could not recover for labour or materials used in printing any work, unless he affixed his name to it pursuant to the 39 G. 3, c. 79, s. 27. Bayley, J., there says: "The 39 G. 3, c. 79, establishes several regulations for public purposes. It requires that *certain acts shall be done, and makes it penal for any person to neglect to do those acts. The omission to do them is a direct [*204 violation of the law: and a party cannot be permitted in a court of law to recover for work and labour done in direct violation of the law. Where a provision is enacted for public purposes, I think it makes no difference whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done; and the objection in this case must prevail, not for the sake of the defendant, but for that of the public." There are numerous authorities to show that a thing the doing of which is prohibited by an act of parliament, on grounds of public policy, though the prohibition is only enforced by means of a penalty, cannot be made the subject of an action in a court of law. The law is clearly and distinctly stated by Parke, B., in delivering the judgment of the Court of Exchequer in *Cope v. Rowlands*, 2 M. & W. 157,† where he says,—“It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is, expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void if protected by a statute, though the statute inflicts a penalty only; because such a penalty implies a prohibition: per Lord Holt, *Bartlett v. Viner*, Carth. 252, Skin. 322. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The only question is, whether the statute *means to prohibit the contract*." This principle was acted upon by this Court in *Ritchie v. Smith*, *6 C. B. 462 (E. C. L. R. vol. 60),(a) where an agreement, the object of which was to enable an unlicensed person to sell excise- [*205

(a) And see *Abbot v. Rogers*, 16 C. B. 277 (E. C. L. R. vol. 81).

able liquors, contrary to the 9 G. 4, c. 61, was held illegal, on the ground of its being an agreement entered into for the purpose of enabling one of the parties to it to contravene a statute passed for the protection of public morals. In *Taylor v. The Crowland Gas and Coke Company*, 10 Exch. 293,† it was held that the 44 G. 3, c. 99, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory act, and therefore such person cannot recover for conveyances drawn by him: and Parke, B., said: "The true principle is laid down in *Cope v. Rowlands*, 2 M. & W. 149,† and *Smith v. Mawhood*, 14 M. & W. 452;† and the question in all these cases is, whether, looking at the statute, the object of the legislature in imposing a penalty, was, to prohibit the particular act, or whether it was for a different purpose. Therefore, the simple point which we have now to decide, is, whether the legislature intended to prohibit this act being done, under a penalty, and thus render it illegal, for, if so, the plaintiff cannot recover." [JERVIS, C. J.—If the third and fourth counts are good, it is unnecessary to discuss this point.] Assuming, then, that the plea is a good plea as to the first and second counts, the question will be whether the third and fourth counts can be sustained. These counts are founded on proprietorship of copyright. The plaintiffs rely on the statutable remedy given by the 5 & 6 Vict. c. 45, s. 15, which remedy is given subject to certain qualifications. To entitle them to enforce that remedy, the plaintiffs must bring themselves strictly within that clause. Now, one essential is, that the action should be brought in that *206] part of the British dominions where the offence is alleged to have been committed; and no offence is committed unless the first publication takes place in England. The allegation here is general, and would be satisfied by proof of printing and publication anywhere. [JERVIS, C. J.—Modern pleadings refer all the allegations to the venue in the margin. WILLIAMS, J., referred to *Steavenson v. Oliver*, 8 M. & W. 234.† There, to debt for work done as an apothecary, the defendant pleaded that the plaintiff was not an apothecary prior to the 1st of August, 1815, nor had at any time obtained a certificate to practise as an apothecary, from the master, wardens, and society of the art and mystery of apothecaries: the plaintiff replied that, before the work was done, and before the 1st of August, 1826, to wit, on, &c., he, the plaintiff, held a warrant as assistant surgeon in the navy, bearing date, &c., and that the work was done after the passing of the 6 G. 4, c. 133: it was held, on special demurrer, that the replication was good.] In that case it might have been enough for the plaintiff to bring himself within the 21st section of the Apothecaries' Act, 55 G. 3, c. 194. The 4th rule of Hilary Term, 1853, directs that "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading:" it also

contains this proviso,—“Provided, that, in cases where local description is now required, such local description shall be given.” [WILLES, J.—To that rule the following note is appended in Chitty’s Statutes, 2d edit. vol. III., p. 560 e—“The meaning of this rule is, that the county named in the margin shall be the place where the plaintiff intended to allege in his declaration that the matters of fact took place. If it is immaterial to prove that those facts took place in the place named as the venue, they need not be proved; but, if material, they must (per Maule, J., *Boydell v. Hackness, 3 C. B. 168 (E. C. L. R. vol. 54), 4 D. & L. 178). A declaration for a penalty, which is local, need not aver that the penal act was done within the county: Cook v. Swift, 14 M. & W. 235.†” *Smith* referred to Wilkinson v. Kirby, 15 C. B. 480 (E. C. L. R. vol. 80).] Assuming, then, that the plea is a good answer as to the first two counts, and admitting it to be bad as to the last two, it does not follow that the whole plea is gone. Gabriel v. Dresser, 15 C. B. 622, is relied on by the other side to show that this plea is not divisible. The nature of the case, however, showed that the plea could not be construed distributively there. The plaintiff declared upon a contract for the delivery of 600 loads of timber at Dantzic; and the plea was, that, after the accruing of the causes of action, and before suit, it was agreed between the plaintiffs and the defendant, that the defendant should deliver to the plaintiffs in London certain other timber, and that such other timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration mentioned,—that the defendant, in part performance of such agreement, delivered to the plaintiffs, and they accepted and received of him, 148 loads, on the terms aforesaid, in full satisfaction and discharge of the causes of action in the declaration mentioned, so far as they related to 148 loads of timber in the contract mentioned,—and that the defendant, within a reasonable time, tendered the plaintiffs the residue of the timber to complete the contract. To which part of the 600 loads could the delivery of the 148 loads be applied? There could be no distributive accord. Then, how does the matter stand independently of authority? The 75th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, provides that “pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken *distributively, and, if issue is taken thereon, [*208 and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered.” What difficulty can there be in distributing the plea here? [WILLIAMS, J.—The 75th section only applies to a good plea. In the case last referred to, my Brother Maule says,—“The Common Law Procedure Act did not mean to make

a plea good which was bad before, but to give particular pleas a partial efficacy. This plea should have been confined to part of the causes of action.”] The 50th section of the 15 & 16 Vict. c. 76 provides that “either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and, where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.” If a plea may be dealt with distributively by the jury, there can be no reason why it should not by the court also. [JERVIS, C. J.—We must give judgment upon the whole record.] The point incidentally arose in *Parr v. Jewell*, 16 C. B. 703 (E. C. L. R. vol. 81), where Parke, B., observes that “the effect of the 75th section is, to extend the doctrine of *Cousins v. Paddon*, 2 C. M. & R. 547,† 5 Tyrwh. 535, 4 Dowl. P. C. 488, to every sort of pleading.” [JERVIS, C. J.—The difficulty that presses you, is, that the plea professes to be an answer to the whole four counts; *209] whereas it is confessedly a bad plea *as to two of them.] The divisibility of the plea cannot depend upon whether it is a good plea or a bad one. Why should any such limited construction be put upon the statute? The obvious meaning of it is, that, if the defendant establishes a defence as to one cause of action, he shall have judgment accordingly.

Smith was about to reply, when

Bovill prayed and obtained leave to amend, by confining the plea to the first two counts. Rule accordingly.

PENNELL and Others, Assignees of SIMPSON, a Bankrupt, v.
BUTLER. April 16.

By the 20th section of the 17 & 18 Vict. c. 119, it is enacted that a trader petitioning for an adjudication of bankruptcy shall forthwith after filing his petition, and before adjudication, make it appear to the satisfaction of the court that *his available estate is sufficient to produce 150*l.* at the least*:—Held, that the decision of the Court of Bankruptcy as to value is conclusive.

THE 93d section of the 12 & 13 Vict. c. 106, enacted “that any trader liable to become bankrupt may petition for adjudication of bankruptcy against himself: provided always, that, unless such trader shall forthwith after the filing of his petition, and before adjudication of bankruptcy, thereunder, make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least 5*s.* in the pound, clear of all charges (to be estimated by the court) of prosecuting the bankruptcy, such petition shall be dismissed, and no further petition

shall be filed by such trader in the same district without the leave of the court first obtained for that purpose, and the adjudication on any further petition shall be subject to the like condition as aforesaid as to the available estate of the trader."

That section is repealed by the 20th section of the 17 & 18 Vict. c. 119, which enacts that "any trader *liable to become bankrupt may petition for adjudication of bankruptcy against himself, but, unless [*210 he shall forthwith after filing his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the court that his available estate *is sufficient to produce the sum of 150l. at the least*, his petition shall be dismissed, and no further petition shall be filed by him in the same district without the leave of the court first obtained, and the adjudication on any further petition shall be subject to the like condition as aforesaid as to his available estate."

On the 14th of November, 1855, Simpson filed a petition under the last-mentioned provision, whereupon he was on the 19th adjudged bankrupt. On the 16th of November, a *fi. fa.* for 47*l.* 18*s.* 6*d.* was issued by Butler upon a judgment obtained by him against Simpson, under which certain goods of Simpson, consisting of the plant of a brewery and of certain household furniture, were seized on the 17th, and sold on the 19th to the extent of 62*l.* 10*s.*, other goods being left upon the premises, to the value (according to the defendant's evidence) of 65*l.* The landlord claimed 30*l.* for a year's rent.

This action was brought by the assignees of Simpson to recover the value of the goods so taken. At the trial before Crowder, J., at the last Assizes at Winchester, the plaintiffs put in a valuation by an auctioneer, in which the plant and furniture were valued at 165*l.*, and the stock in trade at 40*l.*, and also an affidavit which had been produced before the commissioner in support of the adjudication.

On the part of the defendant, it was submitted, that, in order to give the assignees title, they were bound to show that the bankrupt's available assets at the time of filing his petition were worth 150*l.* *independently of the costs of prosecuting the fiat.*

*The learned judge intimated an opinion, that, in ascertaining [*211 the value, the expenses of the proceedings in bankruptcy were not to be deducted; and he told the jury that they might assume the auctioneer's valuation to be the true value, and not the value under a forced sale: but he added, that, in his opinion, the question of value was for the Court of Bankruptcy to determine.

The jury thereupon, under the direction of his lordship, returned a verdict for the plaintiffs.

Slade now moved for a new trial, on the ground of misdirection.—The language of the two sections taken together clearly shows the intention of the legislature, that a trader petitioning for an adjudication of bankruptcy against himself, must show that his "available estate" is

sufficient to produce 150*l.* at least, clear of all expenses or deductions of any kind,—by parity of reasoning to what was required under the old bankrupt law to constitute a good petitioning creditor's debt. The intention was, that that sum should be available for distribution amongst the creditors. It never could have been contemplated that the creditors should find the funds to pass an insolvent debtor through the court. [CROWDER, J.—Is not the question whether the estate is available to the extent of 150*l.*, a question for the Court of Bankruptcy?] It cannot be that the judgment of the Court of Bankruptcy is conclusive. It would be monstrous if it were so, seeing that the execution-creditor, who has no notice of the act of bankruptcy, has no means of disputing the fact of value before that court. Unless, therefore, it may be disputed in this way, the validity of the decision cannot be questioned at all.

JERVIS, C. J.—We need not discuss in this case the principle on which the account of the bankrupt's estate is to be taken, whether with or *212] without deduction for *the expenses of the proceedings under the fiat; for, I think that Mr. *Slade's* motion fails upon the first point, and that it is not competent to the execution-creditor to contest at the trial whether or not the whole 150*l.* was available for distribution amongst the creditors of the bankrupt. What is to be done? The bankrupt is to make it appear to the satisfaction of the court that his available estate is sufficient to produce the sum of 150*l.* at the least; and this is to be done *before adjudication*. Mr. *Slade* contends that the adjudication having taken place, there could be no opportunity to contest the propriety of the decision, unless it may be questioned at the trial. I quite understand and approve of the course which my Brother Crowder took. He at first thought there was something in the point. But, in order to avoid all contest, he decided that the question of value was to be definitively determined by the Court of Bankruptcy. I think my Brother Crowder's more mature opinion was correct, and that the question of value was concluded by the decision of that court, and closed for ever, and could not be called in question on the trial before him.

CRESWELL, J., and WILLIAMS, J., concurred.

CROWDER, J.—I continue of the opinion I ultimately came to at the trial. I think the Lord Chief Justice has stated the correct view, and that Mr. *Slade* ought not to have been allowed to go into the question of value at all.

Rule refused.

***HUDSON and Others v. CLEMENTSON and Another.** [*213
May 7.

The defendants chartered a ship from Sunderland to Carthage, engaging that she should "with all possible despatch load in the south dock, in the customary manner, from the defendants' agents, a full and complete cargo of coke, to be loaded in regular turn." In an action for not loading the ship "in regular turn," pursuant to the charter-party,—Held, that evidence was not admissible to show, that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait his turn according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable despatch was used.

THIS was an action against the charterers of a ship, for not loading her with coke, pursuant to the terms of the charter-party.

The first count of the declaration stated that the plaintiffs and the defendants agreed by charter-party made the 3d of July, 1855, that the plaintiffs' vessel, called the "Forerunner," then at Sunderland, should with all possible despatch load in the south dock, to wit, at Sunderland aforesaid, *in the customary manner*, from the agents of the said merchants, a full and complete cargo of coke, *to be loaded in regular turn*, and, being so loaded, should therewith proceed to Carthage or Escombrera, or as near thereto as she might safely get, and there deliver the same on being paid freight at and after the rate of 22l. sterling per keel of eleven tons of 20 cwt. delivered of coke; and the defendants thereby engaged and agreed that the said vessel should be loaded in regular turn: Averment, that the plaintiffs did all things necessary on their part to enable them to have the said vessel loaded in regular turn according to the terms of the said charter-party, and that, on the 5th of July, 1855, the said vessel was ready, to wit, in the south dock at Shields aforesaid, to be loaded in regular turn,—of all which the defendants then had notice: Breach, that, although the said vessel might and could within a reasonable time after the making of the said charter-party, have been loaded, they the defendants neglected so to load the said vessel, and, on the contrary thereof, the defendants delayed loading the said vessel, and kept and detained the said vessel, to wit, in the south dock at Sunderland aforesaid, for a long and *unreasonable [*214 time over and above the time within which the said vessel might and could have been loaded in regular turn as by the said charter-party agreed, whereby the said vessel was greatly delayed, to wit, thirty-five days, in proceeding on her said voyage to Carthage or Escombrera; and the plaintiffs were thereby put to great charges and expenses in maintaining the master and mariners of the said vessel during the said thirty-five days, and were also then obliged to pay, and did pay, a large sum of money for extra dock dues, to wit, at Sunderland aforesaid, on account of the said vessel, and also during all that time lost and were deprived of the use of the said vessel, and of all the profits thereof.

The second count stated, that the plaintiffs and the defendants by the said charter-party in the first count mentioned agreed as in that count

mentioned and set forth, and that the plaintiffs did all things necessary to entitle them to have the said vessel in the charter-party mentioned loaded according to the terms thereof, yet the said vessel was not loaded in regular turn, but the defendants neglected and refused so to load the said vessel, whereby the said vessel was greatly delayed, to wit, for thirty-five days, in proceeding on her said voyage to Carthagea or Escombrera, and the plaintiffs were thereby put to great charges, &c.

Pleas, first, to the whole declaration, that the defendants did not agree by the said charter-party as alleged. To the first count,—a denial of the alleged breach,—that the vessel was not ready to be loaded in regular turn, as alleged,—that the defendants did not have notice, as alleged,—that, before the alleged breach by them of the charter-party, the plaintiffs exonerated and discharged the defendants from performing their said engagement and agreement that the said vessel should be loaded in regular turn,—and leave and license. To the second count,—that the vessel was not ready to be loaded in regular turn according to the *215] said charter-party,—that *the said vessel was loaded in regular turn, and a denial of the alleged breach,—that, before the alleged breach by the defendants of the charter-party, the plaintiffs exonerated and discharged the defendants from performing the said charter-party in respect of the defendants' loading the said vessel in regular turn,—and leave and license.

The plaintiffs joined issue on the first, second, third, fourth, seventh, and eighth pleas, and took issue on the fifth, sixth, ninth, and tenth.

The cause was tried before Martin, B., at the last Spring Assizes at Liverpool. The facts were as follows:—

The plaintiffs are the owners of a ship called the Forerunner, and the defendants are coke merchants at Newcastle-upon-Tyne. On the 8d of July, 1855, the following charter-party was entered into between them:—

“It is this day mutually agreed between Mr. R. M. Hudson, on behalf of owners of the good ship or vessel called the Forerunner, —, master, of the burthen of 558 tons register, or thereabouts, now at Sunderland, and Charles Clementson & Co., agents for the freighters, that the ship, being tight, staunch, and every way fitted for the voyage, shall, with all possible despatch, load in the south dock, *in the customary manner*, from the agents of the said merchants, a full and complete cargo of coke, *to be loaded in regular turn*, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to Carthagea or Escombrera, or so near thereunto as she may safely get, and there deliver the same, on being paid freight at and after the rate of 22l. sterling per keel of eleven tons of 20 cwt. delivered of coke, in full of all port charges and pilotage, Ramsgate and Dover dues, any extra export and import duty in consequence of ship not being British, to be

borne by the ship (the act of God, the *Queen's enemies, fire, [*216 and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). The cargo to be delivered from alongside, free of expense and risk to the ship, according to the custom and laws of discharge at the port of destination; and no part of the cargo to be used during the voyage, or to be retained after discharging. Coke to be stowed fore and aft, and bulk-heads or mats, if necessary, to be provided by the master, who is to sign bills of lading for quantity of coke or coals put on board, without qualification. The freight to be paid on unloading and right delivery of the cargo, in cash for ship's use, and the remainder by an approved bill on London at usance. Ship to be addressed to charterers' agents at the port or ports of discharge, paying the usual commission of 2 per cent. One working day per keel and a half, weather permitting, to be allowed the said merchants (if the ship is not sooner despatched) for unloading the said vessel at the port of discharge (Sundays excepted), and ten days on demurrage, over and above the said laying days, at 5*l.* per day. The ship is to lie, if so directed by the freighters' agents, alongside any vessel, or at any wharf where she may safely deliver; and the master to take on board sufficient coals for ship's use, and have same endorsed on bill of lading. A brokerage of 5 per cent. on the amount of freight and prime is due by the ship to Charles Clementson & Co. on assignment of this agreement, and the vessel is to be cleared by them at the Custom House, the captain or owner paying all charges on receiving his despatches, including one guinea Foy. Penalty for non-performance of this agreement, estimated amount of freight. The owners having liberty to take a small portion of the coke into the roads at their cost, if required."

On the part of the plaintiffs, evidence was given that *the [*217 Forerunner was ready to take in cargo on the 6th of July, and that notice of that fact was then given to the defendants. On the 14th, the following letter was addressed by the defendants to the plaintiffs:—

"Sunderland, 14 July, 1855.

"Gentlemen,—On the 3d instant, when the Forerunner was chartered, your Mr. Hunter distinctly stated and promised that the turn should be immediate. In fact, the charter stipulates that the ship shall be loaded with all possible despatch. She has now been waiting for her cargo since the 6th; and, from inquiry, we learn that it will be some days before she comes in turn. We have now to give you notice that we shall hold you answerable for the delay, and that we now consider the ship is on demurrage, and shall act accordingly."

To this letter the defendants replied on the 16th, as follows:—

"We are in receipt of your favour of 14th instant, and have to-day seen Mr. Morrison, who is making arrangements to load the Forerunner without any unnecessary delay. This is the first notice we have had of

the vessel being ready: she was still lying at the quay on the opposite side of the dock on the 11th, not then ready. The last paragraph of your letter is quite uncalled for. We do not acknowledge your claim for demurrage."

The plaintiffs, on the 17th, again wrote to the defendants, as follows:—

"We have your favour of 16th. The Forerunner is still lying at the East Quay, where she remains until she comes in turn; there being still one or two ships before her; so we are advised. Whatever you may be pleased to assert to the contrary, we are in a position to prove that the vessel has been ready and waiting for the cargo from the time as advised; and, of course, we hold you liable under the terms of charter."

*218] "On the 23d, the plaintiffs wrote again to the defendants, as follows:—

"That you may take measures to avoid as much as possible the amount of damage due to the owners of the Forerunner for demurrage, we think it right to advise you that to-day we have applied to the Sunderland Dock, and find that no coke has been sent down from Mr. Morrison since the 19th, and that the ships as under are the order in which Mr. Morrison has instructed the off-putter to load, viz.

"Minerva wants yet 50 wagons.

"Lucia will take . 120 wagons.

"Robert . . . 120 wagons.

"Forerunner . . 250 wagons."

"You will thus see that the Lucia is still ordered to load, although your Mr. Bowden advised the writer to the contrary. We write you this without prejudice to any course the owners may be advised to pursue as to their claims for demurrage."

To this the defendants on the following day replied, that "the Forerunner would commence loading on Monday next, and would be finished without any stoppage."

The Forerunner began to take in cargo on the 31st of July, and completed her loading (244 wagons of 38 cwt. each) on the 14th of August,—six days being, according to the plaintiffs' evidence, ample time for taking on board that quantity, if the coke had been ready to load.

For the purpose of proving the custom of the port of Sunderland as to the loading of coke, a book called the "Dock Turn-Book," which was kept by the staith-master, was produced, and the staith-master was called. He stated that he entered the Forerunner by the direction of Mr. Morrison, the merchant who was to supply the coke for her loading; that, though ready on the *6th of July, she did not com-
*219] mence loading until the 31st, and was not finished till the 14th of August; and that, if the coke had been at hand, she could have been loaded in twelve hours. On cross-examination, he stated, that, when a vessel is loaded, she loads from a particular coke owner; that the merchant puts down the name of the ship in a book kept by the coke

manufacturer at the coke merchant's or coal owner's office; that the merchant requests the manufacturer or coal owner to lay the ship on; that he loads the ships according to their turn in his book; that the *Forerunner* was loaded in her usual turn, according to the directions received from Mr. Morrison, and in a reasonable time.

The plaintiffs claimed thirty-three days' demurrage at 5*l.* per day.

The learned judge then asked the defendants' counsel what defence he proposed to set up; and, on its being stated, he made a note of it, and showed it to the defendants' counsel, who, after suggesting some alteration, assented to it. The note was as follows:—

“Mr. Temple (for the defendants) proposed to prove, that, according to the custom of the port of Sunderland under such a contract as this, the shipowner is bound to wait until a manufacturer of coke, who is not named in the contract, has supplied all ships whose names are put down in a turn-book kept by the manufacturer, which he has previously contracted to load with coke in the port, provided he uses reasonable despatch to provide coke for all such ships, and provided the manufacturer's name is mentioned at the time when the contract is entered into.”

The learned judge refused to admit this evidence for the purpose of putting a construction upon the charter-party: and he then, without putting any question to the jury, directed them to find a verdict for the plaintiff on all the issues: and thereupon it was agreed, at his suggestion, that the damages should be taken at 100*l.*

**S. Temple*, on a former day in this term, obtained a rule nisi [220 for a new trial, on the grounds,—“First, that the judge misdirected the jury in directing a verdict to be entered for the plaintiffs upon the evidence, there being no sufficient evidence in support of the breaches assigned by the plaintiffs in the declaration,—secondly, that the judge improperly rejected evidence on the part of the defendants, of the custom of the port of Sunderland, and of the conversation and circumstances attending the making the charter-party in the declaration mentioned,—thirdly, that the construction put by the judge upon the charter-party was not the correct construction in point of law.” *Robertson v. Jackson*, 2 C. B. 412 (E. C. L. R. vol. 52), *Leidemann, App.*, *Schultz, Resp.*, 14 C. B. 88 (E. C. L. R. vol. 78), and *Harrison v. Dreesman*, 23 Law Journ. Exch. 210, were referred to.

Watson, Hugh Hill, and *Milward*, showed cause.—The evidence proposed to be given on the part of the defendants was properly rejected; its object being, as reported by the learned judge, to put a construction upon the charter-party different from that which its words import. The contract was, to load “a full and complete cargo of coke, to be loaded in regular turn,”—not any particular sort of coke. It will be contended, that, because *Morrison's Burn Moor* coke was mentioned at or about the time of the contract, the contract is to be read as if it were for the loading of a cargo of coke of that description, and no other; and that

the coke was to be put on board, not according to the regular turn of the vessel in the dock, but according to her turn of entry in Morrison's book. This, it is submitted, would be giving the contract a totally different aspect. At Newcastle, the loading of coal is regulated by an act of 8 & 9 Vict. c. lxxiii., and by the usage of the locality the course of proceeding with regard to the loading of coke, though not the subject *221] of statutory regulations, is substantially the same: *but there is no turn-act as applicable to the Wear. It appeared, however, at the trial, that there is a turn-book kept at the south dock at Sunderland according to which the Forerunner should have been loaded. [CRESSWELL, J.—The argument on the part of the defendants will be, that the phrase “regular turn” is ambiguous: they contend that it means “turn in the coke manufacturer's book;” whereas you insist that it means “turn at the dock.”] Is it submitted that there is no ambiguity on the face of the charter-party. It is open to the defendants to show, when the contract uses the term “coke,” generally, by parol evidence, that a particular description of coke was intended? [CRESSWELL, J.—If “turn” in this charter-party means turn in the coke manufacturer's turn-book, and that book shows the particular description of coke which was meant, that, I apprehend, would let in the explanation.] Evidence of the general custom of the port no doubt would be admissible. But here it is not sought to apply a fixed, invariable custom, but something that is to vary according to the caprice of the contracting parties. It is unnecessary to refer to the cases which show that particular usages or understandings of a given trade or place are to be considered as incorporated into contracts made in reference thereto. That which is here sought is, to explain the contract by some book which is kept, not at the place of loading, but elsewhere. By what authority is the particular description of coke entered in the book? [CRESSWELL, J.—By what authority is the “turn” entered in the dock turn-book? What does “regular turn” mean?] It is in truth insensible. [CRESSWELL, J.—The contract then becomes a contract to load in a reasonable time. What is a reasonable time?] That must depend on circumstances. The construction contended for on the other side is most unreasonable: the ship-owner has no means of *knowing what contracts the coke manu- *222] facturer may have entered into.

S. Temple and Udall, in support of the rule.—The evidence which was tendered, and rejected by the learned judge, was tendered for the purpose of showing that the Forerunner had been loaded within a reasonable time, and in her regular turn according to the custom of the port. [CRESSWELL, J.—Were you not seeking to add by parol to the written contract something which was said at the time the contract was made?] In *Leidemann, App., Schultz, Resp.*, 14 C. B. 38 (E. C. L. R. vol. 78), by a charter-party, the ship was to proceed to Newcastle, and, on arrival there, “be ready forthwith, in regular turns of load-

ing, to take on board a full and complete cargo of four keels of coals, and the remainder coke:" and it was held, that, though there is no statutory regulation as to the loading of coke at Newcastle, evidence which was offered to show that the usage or practice there was, to load coke "in turn," in the same manner as coal was loaded under the act of parliament, was improperly rejected. Jervis, C. J., there says: "When it is known that there is an act of parliament which regulates the loading of coal at Newcastle, and that the Tyne is full of ships waiting to receive coke as well as coal, one would expect to find some local usage to regulate the loading of coke: therefore I think that a charter-party providing for the reception of a cargo of coals and coke 'in regular turns of loading,' presents such an ambiguity as to let in evidence to show that the parties meant, as to the coal, the turn of loading provided for by the act of parliament, and, as to the coke, the turn of loading established by the practice of the port. I therefore think the evidence was improperly rejected. The case is very similar in principle to that of *Robertson v. Jackson*, 2 C. B. 412 (E. C. L. R. vol. 52), where this court had to put a *construction upon the expression 'in turn to deliver,' in a charter-party, and also to those other [*223 cases of contracts containing terms which import something not expressed on the face of them." [CRESSWELL, J.—You want something more than *Leidemann v. Schultz* to help your argument.] The defendants were prepared to show that freights were always regulated by the knowledge of the description of coal or coke intended to be shipped; and that the plaintiffs, at the time this contract was entered into, availed themselves of the opportunity of going to Morrison's office to ascertain if it would be a long or a short turn. What was there to prevent them from giving evidence that this was part of the bargain? The letter of the 14th of July shows that the plaintiffs perfectly well understood what was meant by "turn." It clearly was competent to the defendants to show, that, according to the understanding and meaning of the parties, "regular turn to load" referred to the course of the manufacturer who was to supply the article,—the turn in which the ship could be loaded with the description of coke contemplated. No turn could be obtained without having the name of the coke manufacturer. The case of *Robertson v. Jackson* is very much in point. There, by a charter-party, A., the owner, agreed that the ship should proceed to the Tyne, and there load a cargo of coals, and proceed therewith to Algiers, and deliver the same there, on payment of certain freight. B., the charterer, engaged that the vessel should be unloaded at a certain average rate per day, and that, if detained for a longer period, he would "pay for such detention at the rate of 5*l.* per day, to reckon from the time of the vessel being ready to unload, and *in turn to deliver.*" According to the general regulations of the port of Algiers, vessels may commence unloading as soon as they enter within the mole: but, by a special regulation of the

*224] French government, coals destined for the use of *the marine department are required to be unloaded at a particular spot, and in a given order. It was held, that evidence was admissible to show that the words "in turn to deliver" had by the usage of the particular trade acquired a known meaning in reference to this special regulation with respect to coals for the use of the French marine department, *although A. was not cognisant of the fact that the coals had been shipped under a contract with the French government*; and that the special regulation as to the unloading of coals for the French marine department, was to be considered one of the regulations of the port, binding upon all vessels entering the port. It is not sought to import any term or condition which is not in reality expressed in the charter-party. The provision is, that the ship shall be loaded "in the customary manner, in regular turn." Whatever, therefore, is the customary manner, in regular turn, is in truth a part of the express terms of the contract. Then, what is to prevent the defendants from showing that it is a part of the customary manner of loading in regular turn, to load according to the turn-book of some manufacturer named at the time of the contract?

JERVIS, C. J.—This case is not entirely free from difficulty: but, upon the whole, I am of opinion that there should be a new trial. We all concur in thinking that the point made by Mr. *Temple* at the trial, in the precise terms of the judge's note, cannot be supported; that the construction of the charter-party does not depend upon the mentioning the name of the coke manufacturer at the time of the contract: and we are disposed to construe the note made by the learned judge with all the strictness of a bill of exceptions, as it was corrected and assented to by the defendants' counsel at the trial. Dealing with it, therefore, exactly as if we were adjudicating upon the strict and literal terms of a bill of *225] *exceptions, we are of opinion that the contract cannot be qualified in the manner suggested. But the question is, what is the meaning of the expression "to be loaded in regular turn," with reference to the breaches assigned in the declaration. I must confess I do not see any very sufficient evidence of the breach that the Forerunner was not loaded in regular turn according to the terms of the charter-party. The defendants might, if they had been allowed to go into evidence upon the subject, have shown that the ship *was* loaded in regular turn according to the custom or usage of the port. It seems to me that the justice of the case will be best answered by making the rule absolute for a new trial, *on payment of costs*.

CRESSWELL, J.—I am of the same opinion. With regard to the ruling of Mr. Baron Martin, I think it ought to be looked at as if we were dealing with a bill of exceptions. It is impossible to say that the evidence proposed to be given by Mr. *Temple* would not be introducing into the written contract something that was inconsistent with it,—that is to say, the mentioning the name of the coke manufacturer,—which

passed by parol between the parties at the time the contract was entered into. I think the learned Baron was quite right in refusing to admit evidence to control or vary the contract, such as that which was tendered. As to the other point,—and I dare say it was the main point the parties intended to fight,—I think the verdict was not quite satisfactory upon the question whether or not the vessel was loaded in a reasonable time. I therefore think there ought to be a new trial, on payment of costs.

CROWDER, J.—Seeing the manner in which the objection was taken, I think it must be looked at strictly: and so looking at it I am of opinion that the ruling of the learned judge was quite correct. But I also agree *with my Lord and my Brother Creswell, that the plaintiffs failed to establish the case which they were bound to make [*226 out, to entitle them to succeed, viz. that the defendants broke their contract to load a cargo of coke in the customary manner, in regular turn. Now, “in regular turn” must mean something: the expression cannot have been introduced, as the plaintiffs’ counsel contend, for no purpose. I am not satisfied that the verdict is right, and therefore I agree that there should be a new trial.

WILLES, J.—I am of the same opinion. I wish merely to add that by the mention of the name of the coke manufacturer at the time it is entered into, does not influence my decision.

Rule absolute, on payment of costs.

LOUIS, COUNT PIANCIANI, v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. *May 6.*

To a count charging the defendants, common carriers by railway from London to Southampton and thence to Jersey by steam-vessels, charging them with the loss of a passenger’s portmanteau,—the defendants pleaded that the goods contained in the portmanteau were writings, silks, furs, and lace, within the meaning of the Carriers’ Act, 11 G. 4 and 1 W. 4, c. 68, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the defendants, “then being common carriers by land for hire, to be carried by them, as such carriers by land, over their said railway;” that such delivery was made to the servants of the defendants; that, at the time of such delivery, the value and nature of the said goods were not declared by the plaintiff; and that the non-delivery of the said goods to the plaintiff in the count complained of was by reason of the same being lost by the defendants out of their possession while the same were upon the railway of the defendants, and in their possession and under their care *as such carriers by land* as aforesaid:—Held, a good plea.

To a count alleging that the plaintiff became a passenger by the defendants’ railway and steam-vessel from London to Jersey, and charging that the defendants refused to carry his portmanteau, containing articles of wearing apparel, paper writings, and documents,—the defendants pleaded a similar plea to the above:—Held, bad on demurrer, the count not alleging a *loss* of the package.

Where two pleas are demurred to, and the demurrer fails as to one, and the defendant elects to amend the other, the only rule the court can pronounce is, a rule for the defendant to be at liberty to amend.

THIS was an action against the London and South Western Railway Company for the loss of a passenger’s luggage.

*The first count of the declaration stated, that the defendants
 *227] were the owners and proprietors of a railway from a place or railway station called the Waterloo Station, in the county of Surrey, to the port of Southampton, and also were possessed of certain steam-vessels for navigating between the port of Southampton aforesaid, and one of the Channel Islands, called Jersey, and, at the time of the committing the grievances thereafter mentioned, the defendants were common carriers for hire in and upon the said railway, and in and by the said steam-vessels, from the said Waterloo Station aforesaid to Jersey aforesaid; that the plaintiff, on the 8th of June, 1855, became a passenger, at the said Waterloo Station, to be carried and conveyed, together with his luggage, from thence to Jersey aforesaid; that the defendants, as such common carriers as aforesaid, received the plaintiff and his luggage, consisting, amongst other things, of two portmanteaux and a hat-box, to be safely and securely kept and carried by the defendants, as such carriers, from the Waterloo Station aforesaid along their railway, and by their said steam-vessels, to Jersey aforesaid, and, on the arrival of the plaintiff at Jersey aforesaid, to be forthwith delivered to him; that thereupon it became and was the duty of the defendants to use due and proper care that the plaintiff and his said luggage should be safely and securely carried and conveyed from the said Waterloo Station to Jersey aforesaid, and that the plaintiff's luggage should be delivered to him as aforesaid: and, although the defendants, as such carriers, then had and received the said luggage for the purpose aforesaid, and although the defendants conveyed the plaintiff to, and he arrived at, Jersey aforesaid, on the 9th June, 1855; yet the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage, conveyance,
 *228] and delivering of the plaintiff's luggage, *but so negligently conducted themselves with respect thereto, that, by and through the negligence, carelessness, and default of the defendants in the premises, the luggage of the plaintiff was not safely and securely carried and conveyed to and delivered by the defendants to the plaintiff at Jersey on his arrival there as aforesaid, according to the duty of the defendants in that behalf, but, on the contrary, by and through the carelessness, negligence, and default of the defendants, a part of his said luggage, to wit, one of the said portmanteaux, and the said hat-box, and the goods therein contained, being of the value of 100*l.*, were for a long space of time, to wit, from the said 9th of June, to the 15th of June, then next, wholly lost to the plaintiff, and the plaintiff was deprived of the use, enjoyment, and possession of the same during the time aforesaid, and another part of the said luggage, to wit, the other of the said portmanteaux, and the goods therein contained, being of the value of 2500*l.*, were, on the said 9th of June, and from thence hitherto had been, also wholly lost to the plaintiff, &c., &c.

The second count stated that the defendants were common carriers of

passengers and their luggage from, &c., to, &c., for hire and reward to them in that behalf; that the plaintiff was desirous of becoming a passenger, and of being carried and conveyed, together with his luggage, in and by the said railway carriages and steam-vessels from Waterloo Station aforesaid to Jersey aforesaid; that the plaintiff paid the passage-money requisite to entitle him to be so carried and conveyed, and to have his luggage carried and conveyed with him, from Waterloo Station aforesaid to Jersey aforesaid; that the defendants received him and his luggage, amongst other things, a certain portmanteau containing, &c., and it became their duty to carry the said portmanteau, together with him the plaintiff, from, &c., to, &c.; and the *plaintiff did all [*229 things necessary, and everything happened, to entitle him the plaintiff to have the said portmanteau so carried with him as aforesaid: yet the defendants did not nor would carry the same, but wholly neglected so to do, and therein made default.

The third count was in detinue for one portmanteau, containing wearing apparel, &c.

The defendants pleaded,—fourthly, as to so much of the first count as relates to the goods contained in the portmanteau in that count secondly mentioned, that the said goods were writings, silks, furs, and lace within the meaning of the act thereafter mentioned, and were contained in one package or parcel, viz. the said portmanteau, and exceeded in value 10*l.*; that the said goods in the said package were, after the coming into effect of the 7 G. 4 & 1 W. 4, c. 68, commonly called the Carriers' Act, delivered by the plaintiff to the defendants, then being common carriers by land for hire, to be carried by them, as such carriers by land, over their said railway in the first count mentioned, and that the receipt thereof by the defendants, as in the first count mentioned, was, by reason of such delivery, and not otherwise; that such delivery was made to the servants of the defendants; and that, at the time of such delivery, the value and nature of the said goods were not declared by the plaintiff, then being the person delivering the same, and that the non-delivery of the said goods to the plaintiff in the said first count complained of, was by reason of the same being lost by the defendants out of their possession while the same were upon the said railway of the defendants, and in their possession and under their care as such carriers by land as aforesaid.

Sixthly, as to so much of the second count as related to the said articles of wearing apparel, and the said papers, writings, and documents in that count mentioned, that *the said articles of wearing apparel [*230 were silk, furs, and lace, and that the said papers, writings, and documents, were writings within the meaning respectively of the act thereinbefore mentioned, and were contained in one package or parcel, viz. the said portmanteau, and exceeded in value 10*l.*; that the same were, after the coming into operation of the act in the fourth plea men-

tioned, delivered by the plaintiff to the defendants, then being common carriers by land, for hire, to be carried by them as such carriers by land upon a certain railway, and that the receipt thereof by the defendants in the said second count mentioned, was, by reason of such delivery, and not otherwise; that such delivery was made to the servants of the defendants; and that, at the time of such delivery, the value and nature of the articles aforesaid were not declared by the plaintiff, then being the person delivering the same; and that the non-delivery of the said articles to the plaintiff in the said second count complained of, was, by reason of the same being lost by the defendants out of their possession while the same were upon the said railway of the defendants, and in their possession, and under their care, as such carriers by land as aforesaid.

The plaintiff demurred to the fourth and sixth pleas on the ground that "the carriers' act does not exempt carriers from liability, unless a notice be affixed in their receiving-house, of the rate of charge at which the excepted articles mentioned in the act are to be carried; and that no such notice is alleged in the plea to have been affixed in the present case."

Lush, in support of the demurrer. (a)—In *Baxendale v. Hart*,
 *231] 6 Exch. 769,† the Exchequer Chamber held that a person who delivers to a carrier goods of the description mentioned in the 11 G. 4
 *232] & 1 W. 4, c. 68, s. 1, (b) must, in order to fix the carrier with *responsibility for their loss, declare to him the nature and

(a) The points marked for argument on the part of the plaintiff, were,—

As to the fourth plea,—“1. That the carriers' act, 11 G. 4 & 1 W. 4, c. 68, does not exempt a carrier from liability, unless a notice be affixed in his receiving-house of the rate of charge at which the excepted articles mentioned in the act are to be carried; and that no such notice is alleged in the plea to have been affixed in the present case. 2. That the contract stated in the first count was an entire indivisible contract: and that the exception in the carriers' act does not apply to such contract. 3. That the default of the defendants complained of in that part of the first count to which the fourth plea is pleaded, was a loss to the plaintiff of the goods mentioned in the introductory part of the fourth plea, and not a loss or non-delivery by the defendants; and that the fourth plea shows no ground of justification for such loss to the plaintiff.”

As to the sixth plea,—“1. 2. (the same as above). 3. That the default of the defendants complained of in that part of the second count to which the sixth plea is pleaded, was the not carrying goods received by them as common carriers for the purpose of being carried; and that the justification pleaded is no answer to such violation of their duty as common carriers, nor is it pleaded as such answer, but to a supposed non-delivery of which the plaintiff does not complain in the second count, to which the sixth plea is pleaded. 4. That the carriers' act does not exempt the defendants from their obligation to carry the plaintiff's goods, even though it may exempt them from liability for the loss of such goods, where their value has not been declared.”

(b) The first section,—after reciting that, “by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, wagons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value, in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail-contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and that, through the frequent omissions by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail-contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail-contractors, stage-coach proprietors, and

value of the goods at the time of their delivery, whether it takes place at his office, or on the road, or elsewhere; and that, if no such declaration be made, the omission *of the carrier to affix in his office the notice required by that statute, will not render him responsible. [*238] The plea therefore cannot be said to be bad on the first ground. But the real question is, whether the carriers' act protects the carrier where he makes a contract to carry both by land and by water. It is submitted that the statute applies only to cases where the termini from and to which the carrier professes to carry are both in land. The statute addresses itself entirely and exclusively to carriers by land; and the carrier has no right to split the contract, and say that he makes a different contract for that portion of the journey which is by water from that which is to be performed on land. [JERVIS, C. J.—The question was raised, but not decided, in this court, in *Benett v. The Peninsular and Oriental Steamboat Company*, 6 C. B. 775 (E. C. L. R. vol. 60).] All the provisions of the act are referable to contract for land carriage within the realm. [CRESSWELL, J.—Would not a mail-contractor or carrier between London and Dublin be within the protection of the act?] Suppose a package is delivered to the company at Jersey, where they

other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses,"—enacts, "that, from and after the passing of this act, no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Bank of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter (s. 2) mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

The 2d section empowers the carrier to demand an increased rate of charge for the conveyance of parcels containing any of the articles above specified, notice thereof being affixed in his office or warehouse; "and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

Section 4. "Provided always, and be it enacted, that, from, &c., no public notice or declaration heretofore made or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any mail-contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail-contractors, &c., shall, from, &c., be liable as at the common law to answer for the loss of any [or] injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding."

have no receiving-house. [CRESSWELL, J.—Why should we assume that the company have no receiving-house in Jersey?] Then, the defendants should have negatived by their plea anything like gross negligence: in *284] short, *they should have incorporated therein the proviso contained in the 8th section.(a) [JERVIS, C. J.—That is never done.] The sixth plea is clearly no answer to the second count. That count complains, not of the non-delivery of the portmanteau, but that the defendants declined to carry it, which they had no right to do.

H. J. Mills (with whom were the *Attorney-General* and *Byles*, Serjt.), contra.(b)—[JERVIS, C. J.—We think the defendants are entitled to succeed on the fourth plea: but, as to the sixth, they had better amend.]

Mills accepted the leave to amend the sixth plea, but submitted that the defendants were entitled to judgment on the demurrer to the fourth plea.

CRESSWELL, J.—There can be no judgment at all where the case stands over for amendment. Rule to amend.

(a) Which enacts as follows:—"Provided also, and be it further enacted, that nothing in this act shall be deemed to protect any mail-contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

(b) The points marked for argument on the part of the defendants were:—"That the pleas are good in substance, and a complete answer to so much of the first and second counts respectively as they are respectively pleaded to; that the facts pleaded in each plea bring the case within the 11 G. 4 & 1 W. 4, c. 68, and exempt the carrier from liability; that it is not necessary that the carrier should have affixed any notice in his office,—*Baxendale v. Hart*, 6 Exch. 769;† and that the loss is shown by the pleas respectively to have been such a loss as is meant by that statute,—*Hearn v. The London & South Western Railway Company*, 10 Exch. 793."†

*235] *HENRY HOUGHTON v. KÖENIG. April 18.

In an action for rent upon an indenture of lease, the defendant pleaded non demisit. The counterpart was held sufficient evidence of the demise. The defendant further pleaded the bankruptcy of the plaintiff: the plaintiff replied, that he let the premises to the defendant as trustee for J. S., and that he had no beneficial interest therein, and was suing as such trustee:—Held, that his being trustee was not material, as he had shown by parol that he had no beneficial interest in the premises.

THE first count of the declaration stated that the plaintiff, on the 11th of December, 1854, by deed let to the defendant a house and premises situate No. 90, Grand Junction Terrace, Edgeware Road, for three years, to hold from Christmas Day, 1854, at the yearly rent of 200*l.*, payable in twelve equal payments, being 16*l.* 13*s.* 4*d.* on the 25th day of each month in each year during the said term; and that the defendant by the said deed covenanted with the plaintiff to pay to him the said rent, at the times and in manner aforesaid, of which rent

80*l.* 16*s.* 8*d.*, being parcel of two months' rent, had become and was due, in arrear, and unpaid.

There was also a count "for money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of a house and premises of the plaintiff," and a count upon an account stated.

The defendant pleaded,—first (to the first count), that the plaintiff did not let to the defendant as alleged,—secondly (as to the residue of the declaration), never indebted,—thirdly, that the plaintiff, being a trader within and subject to the statutes in force concerning bankrupts, and being indebted to Stephen Stratton in 50*l.* and upwards, became and was a bankrupt, and thereupon, afterwards, and before action, the said Stephen Stratton, being such creditor of the plaintiff, duly and according to the statute in such case made, petitioned the Court of Bankruptcy, London, being the proper court in that behalf, for an adjudication in bankruptcy against the plaintiff, upon which petition the plaintiff was afterwards duly adjudged bankrupt by the said court; that such proceedings were thereupon had, *and all conditions [*236 precedent, necessary matters and things in that behalf were done, that J. E., T. W. E., and J. P. F., were duly appointed, chosen, and became assignees of the estate and effects of the plaintiff under his said bankruptcy; and that the contracts in the declaration mentioned were made by and with, and the supposed debts therein mentioned became due to the plaintiff before he became bankrupt as alleged,—fourthly, payment,—fifthly, set-off,—sixthly, as to the first count, that, before any part of the alleged rent accrued due, the defendant was evicted from the said house and premises by John Bradley, who was then entitled to the same by title paramount to the title of the plaintiff.

The plaintiff joined issue on the first, second, fourth, fifth, and sixth pleas, and replied to the third, that he let the house and premises in the first count mentioned, and permitted the defendant to use the house and premises in the second count, he the plaintiff then being, and as, trustee of J. S. Taylor, and that the accounts in the declaration mentioned were stated with the plaintiff as such trustee, and that the several moneys in the declaration became and were due from the defendant to the plaintiff as such trustee, and that the plaintiff was before and at the time of the bankruptcy entitled to the whole of the money claimed as such trustee, and not in his own right, and that he had not at the time of his bankruptcy any beneficial interest whatever in the said money, or in any part thereof, whereof the defendant had notice before and at the time of the bankruptcy of the plaintiff, and that the plaintiff now sued for the said money as such trustee, and not otherwise. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings at Westminster after the last term. It appeared that the defendant held the pre-

mises in question under a lease executed by the plaintiff under a power
 *237] of attorney from *one Taylor, and that rent had been from time
 to time paid (on one occasion after a distress) to the plaintiff,
 and by him handed over to Taylor, who had the beneficial interest.

In order to prove the demise, *Byles*, Serjt., for the plaintiff, put in
 the counterpart lease signed by the defendant, and called upon *Atkin-*
son, Serjt., for the defendant, to produce the lease. The lease was pro-
 duced, but the plaintiff was unable to prove it, for want of sufficient
 evidence of authority.

On the part of the defendant, it was insisted that the plaintiff was
 bound to prove that he demised, and had failed to do so; and that the
 replication to the third plea was not proved, inasmuch as there was no
 declaration of trust as required by the 7th section of the statute of
 frauds, 29 Car. 2, c. 3.

The Lord Chief Justice was of opinion (the words *by deed* being
 struck out) that there was sufficient evidence of the demise, and that
 there was ample proof of the plaintiff's fiduciary character to negative
 the right of his assignees; and he directed a verdict for the plaintiff
 for 30*l.* 16*s.* 8*d.*, reserving leave to the defendant to move to enter a
 nonsuit.

Atkinson, Serjt., now moved accordingly.—The plaintiff failed to
 prove the demise as alleged. Supposing the first count amended, by
 striking out the words *by deed*, the whole contract, consisting of lease
 and counterpart, must be put in. [CRESSWELL, J., referred to *Roe d.*
West v. Davis, 7 East, 363.] That was not an action for rent, but an
 ejectment: and, if not distinguishable on that ground, it is submitted it
 is not good law; for, the distinction in this respect between leases and
 ordinary indentures is clearly established: *Pitman v. Woodbury*, 8
 Exch. 4;† *Swatman v. Ambler*, 8 Exch. 7;† *Morgan v. Pike*, 14 C. B.
 *238] 478 (E. C. L. R. vol. 78). Then there was no *evidence that the
 plaintiff was trustee for Taylor. It is not every confidence that
 constitutes a trust: a trust means something the performance of which
 can only be enforced in a court of equity. And, to make a man a
 trustee of chattels real, the statute of frauds requires a declaration of
 trust. Here, the moment the plaintiff had received this rent, Taylor
 might have brought an action for money had and received. The mean-
 ing of the replication is, not that the plaintiff has no beneficial interest,
 but that he is trustee for Taylor. The latter part is material and tra-
 verseable. [CROWDER, J.—That would be holding that the assignees
 take something in which the bankrupt has no beneficial interest.] The
 pleadings should have been differently framed.

JERVIS, C. J.—The third plea means, that the bankrupt had no bene-
 ficial interest in the premises; and this was proved. *Roe d. West v.*
Davis, 7 East, 363, is in point on the other part of the case. It was
 there held, that, in ejectment upon a clause of re-entry in a lease on

non-payment of rent, against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. Lord Ellenborough there says: "The acknowledgment of the original lessee (from whom the defendant claims) under his seal, that he held these premises under his landlord, upon the conditions and covenants therein expressed, was sufficient evidence of the holding upon such terms, against one holding under the lease." Besides, if the words *by deed* are struck out, the first count is substantially one for use and occupation, and there was ample evidence of payment of rent by the defendant to the plaintiff. I think there is no ground for disturbing the verdict.

The rest of the court concurring,

Rule refused.

***CHESTER v. WORTLEY and COLE. May 8. [*239**

Semble, that the answers to interrogatories under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, ought not to be general, but should answer, or assign reasons for refusing to answer, each interrogatory specifically.

Where a party objects to the sufficiency of the answers, and seeks to have a *viva voce* examination under s. 53, he must apply promptly.

ON the 30th of January last, the plaintiff obtained a rule to deliver to the defendant Susannah Wortley interrogatories in writing, pursuant to the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

The interrogatories delivered under that rule were as follows:—

"1. Was not a lease dated the 9th of September, 1824, or when, made by one John Lyne to one George Curnick, of or including the premises whereof in the present action you seek to defend the possession?

"2. Have you not been, and, if yea, during what period, and when first were you, and are you not, the assignee of the estate, right, title, or interest of the said George Curnick, created by such lease, in respect of the premises whereof in the present action you seek to defend the possession?

"3. Is not the above-named John Lyne dead? And, if yea, when did he die? State about when, if you cannot say exactly when.

"4. Were you, and, if yea, during what period, and to what extent were you acquainted with him?

"5. In case you have answered the first interrogatory in the affirmative, did he not receive rent under the lease in the first interrogatory mentioned? And, if yea, from whom?

"6. Did he not make a will devising the premises in question? And, if yea, to whom? And, did not such devisees, or which of them, and, if yea, when, enter into the receipt of the rent of the premises in ques-

tion under such will? If yea, when, or during when, and by whom was such rent paid?

*240] ***"7.** Had you anything to do, and, if yea, what, with the payment of such rent?

"8. Are you not related, and, if yea, how, to George Curnick above mentioned?

"9. Look at the paper now at your examination produced to you, marked A., and purporting to be a counterpart of a lease, and state whether or not the terms contained in that paper are the same, or substantially the same, as those contained in such lease as is in the first and second interrogatories referred to?

"10. In case you have answered the first and second interrogatories in the negative, state whether or not you claim or derive any, and what, title, estate, or interest under or by virtue of such lease?

"11. Is it not true that the plaintiff was, at the commencement of this suit, entitled to the reversion expectant on such lease, or how otherwise?

"12. Was not the plaintiff, at the commencement of this suit, your landlord in respect of the premises whereof you defend the possession in this action? And, if yea, since when he was such?

"13. The plaintiff admitting that he has no right against you in respect of any rent payable before Michaelmas Day, 1853, have you not before that day, and, if yea, when, or during what period, paid or caused to be paid to him rent in respect of the premises whereof you defend the possession in this action? And what caused you to make such payment or payments?

"14. Has not the plaintiff since the 17th of February, 1846, claimed to be entitled to be paid rent by you, or whom else, in respect of the premises? And, if yea, to what rent when payable did he make such claim, and when first did you know of such claim? And was such claim, if yea, by whom, and when, resisted or repudiated?

*241] **"15.** Have you ever, and, if yea, when, paid rent *in respect of the premises to the plaintiff as agent or bailiff of any and what other party? If yea, what led you to suppose that he was such agent or bailiff to receive such payment or payments?

"16. Is not the plaintiff the freeholder of the premises in question, or how otherwise?

"17. Has not the land in question been enfranchised or converted from copyhold to freehold since the year 1824?

"18. When first, and from whom, did you acquire your right, title, or interest to or in the premises in question? And by what form of conveyance, if any, of what date, between whom, and conveying what interest in the premises to you?

"19. Have you ever, and, if yea, when, before Midsummer Day, 1853, or during what period before then, and to whom, paid rent in

respect of the premises in question, or any and what part thereof? And state whether or not you made any and which such payments to such person or persons as being entitled to or claiming to be paid the same by virtue of his or their interest in the reversion expectant on the above-mentioned lease.

"20. Did you ever, and, if yea, when, or during what period, pay rent in respect of the premises in question to one Edward Austin, or any person or persons acting or professing to act on his behalf for the receipt of such rent? If yea, by virtue of what title did he claim such rent?

"21. Was not rent paid to him in respect of the premises in question? And, if yea, when and by whom, as cestui que trust, or entitled thereto under such devise as in the sixth interrogatory mentioned?

"22. Did he receive rent in respect of the premises in question after the year 1846? And how long, and until when, and from whom, before that date, did he receive such rent?

"23. Did you ever, and, if yea, when, or during *what period, before Midsummer Day, 1853, and when first, and when last [*242 before that day, pay rent to the plaintiff in respect of the premises? And in respect of what title, right, or interest, or claim of his, if any, did you make such payment or payments? If you made any such payment or payments to him as reversioner upon the term, if any, created by the above-mentioned lease, state so, and it will be a sufficient answer to the present interrogatory.

"24. State whether or not have any, and, if yea, what, communications or transactions taken place between you and him during last year, in the course of which you have treated him as your landlord in respect of the premises in question; and whether or not you caused to be tendered (after the commencement of this action) to the plaintiff, as being your landlord of the said premises, the arrears of rent thereof due at Midsummer last, and payable under the said lease: if yea, by whom such tender was made.

"25. Look at the paper hereto annexed, marked B., and purporting to be a copy of a form of receipt, and state whether or not any receipt or receipts in that form were given to you by the plaintiff for rent paid to him as above mentioned.

"26. Was there, at the commencement of this suit, a ditch or drain, about 230 feet long, running along two sides of the premises adjoining those in question, occupied by Mr. George Wells?

"27. Was there, at the commencement of this suit, an open cesspool or bog-hole at the Eastern corner of the premises in question, nearest to the chapel ground?

"28. Did that cesspool and ditch, or either of them, and which, or any part thereof, and, if yea, what part, belong to you?

"29. Do the premises whereof you defend possession in this action

include that cesspool and ditch, or either of them, and which or any and what part thereof?

*243] “30. Have you or any tenant or agent of yours, or person or persons under whom you claim, stating whom, ever, and when, and every time when, altered, enlarged, or narrowed, or heightened or lowered the bank of that ditch, or bridged or arched it over, or closed it, or any part of it, up, or done anything and what to it? State the particulars of your knowledge herein.

“31. When was the ditch or drain made, and by whom? And state whether or not by any person or persons claiming under the above-mentioned lease.

“32. What is the length fronting the Gipsy House Road of the premises the possession of which you defend in this action?

“33. What is the length of the South-Eastern side of the premises which runs at right angles with the Gipsy House Road, and forms a continuation of the boundary line between Rose Cottage and garden and the chapel ground?

“34. Is there, was there, and, if yea, when last was there, a mound and hedge, or either of them, adjoining and running parallel with the cesspool and the ditch on the side of it, which is included by the premises claimed by you?

“35. Have you or your tenants been in the habit of using, or used, the ditch or drain in question?

“36. Are there or is there any drains or drain on your side of the premises, running into the ditch?

“37. Has the ditch been used by you or your tenants in common with the party occupying the land occupied by Mr. Wells as above mentioned? And, if yea, when, how, and to what extent?

“38. Is the ground or soil lying beneath the ditch and cesspool in any and what way yours?

“39. Has the ditch and cesspool been used or enjoyed by you or your tenants as part of the land demised? If yea, when and during what period?

*244] “40. Look at the paper hereto annexed, marked C., and purporting to be a copy of a letter from the plaintiff to you, dated the 4th of September, 1845, and say whether or not you received that letter.

“41. Look at the paper hereto annexed, marked D., and purporting to be a copy of a letter from you to the plaintiff, dated the 16th of September, 1845, and say whether or not you sent such letter to the plaintiff.

“42. If you have answered the two last preceding interrogatories in the affirmative, and if you deny that the plaintiff was at the dates of such letters reversioner of the premises in question, how came such correspondence to take place between you and him, and not between you

and the party, if any, whom you suppose to have been, or who was, such reversioner?

"48. Have you not received rent in respect of the premises in question, or any part thereof, and, if yea, during when, from the defendant Thomas Cole?

"44. Was not such rent paid to you as assignee of a lease, if any, made by the above-named George Curnick?

"45. Was not such lease, if any, an underlease of part of the estate, title, or interest granted by the lease, if any, in the first interrogatory mentioned?"

On the 28d of February, Mrs. Wortley filed her answer, of which the following are the material paragraphs:—

"1. I am, by myself and my tenants, in possession of the land sought to be recovered in this action, and have been so for many years, and claim to have, and believe that I have, a good right and title to such possession for a certain estate and interest.

"2. The plaintiff in this action seeks to eject me and my tenants from the possession of the said land, because, as he alleges, the estate and interest in the said land under which I possess the same as aforesaid, has become forfeited, and he is entitled to enter thereon by reason of such alleged forfeiture. I deny that any forfeiture *has been [*245 incurred, and believe that no forfeiture has been incurred.

"7. The particulars of breaches, obtained under a judge's order, are as follows,—non-repair, allowing and causing stagnant filth to be and remain in an open ditch and other parts of the premises, non-insurance, permitting offensive trades to be carried on in some parts of the premises, and non-payment of rent.

"9. I am advised and believe that the plaintiff is seeking by the said interrogatories, and each and every of them, to obtain evidence from me which he thinks will assist him in establishing the said pretended causes of forfeiture, or some or one of them, and that he has no other object in exhibiting the said interrogatories, and that he cannot otherwise derive material or any benefit in this cause from the discovery which he seeks; and that the said interrogatories, and each and every of them, are either wholly immaterial to the plaintiff's case, or tend to subject me to a forfeiture of my estate and interest in the said land.

"10. I am also advised, and believe, that, by some of the said interrogatories, and especially by those respecting the payment of rent, the plaintiff is seeking to obtain admissions from me, which will prevent the necessity of himself being a witness on his own behalf on the trial of this cause; and I believe he knows more about the said matters than I do, and does not really want any discovery, save for the unfair purpose aforesaid.

"11. I am also advised, and believe, that some of the said interrogatories, and especially those numbered 1, 2, 9, 10, 18, 48, 44, and 45.

require from me a disclosure of my title and title-deeds to the said land.

"12. I am also advised, and believe, that some of the said interrogatories, and especially those numbered 1, 2, 9, 10, 18, 25, 40, 41, 42, 44, and 45, relate to the effect and contents of written documents, which *246] ought to be proved by the documents themselves, and of which I *am not competent to speak; and that the plaintiff may have exhibited them because the supposed documents therein referred to are inadmissible in evidence, either from being unstamped, or otherwise.

"13. For the reasons aforesaid, I humbly and respectfully submit to this honourable court that I have just cause for not answering the said interrogatories, and each and every of them; and, if I have such just cause, I wish to avail myself of it, and to decline answering the said interrogatories, and each and every of them: but, if I have not any such just cause, I humbly submit myself to the judgment of this honourable court, and will answer all the said interrogatories, or such of them as this honourable court thinks I ought to and am bound to answer."

T. E. Chitty now moved for a rule to show cause why the defendant *Susannah Wortley* should not be examined *vivâ voce* before one of the masters, pursuant to the 53d section of the 17 & 18 Vict. c. 125, (a) upon an affidavit of the plaintiff stating that he believed it to be essential and necessary to his case that such *vivâ voce* examination should be had, and that it would be unsafe for him to proceed to trial without such *247] examination. He submitted that the reasons assigned *by Mrs. Wortley for refusing to answer the interrogatories, viz. that the plaintiff was seeking to obtain admissions for the purpose of enforcing a forfeiture, that some of the matters as to which she was interrogated were more within the plaintiff's own knowledge than within hers, and that the answering them would have the effect of exposing her to a forfeiture of her estate, were insufficient; that the interrogatories were framed simply with a view to ascertain whether or not the defendant was tenant to the plaintiff; that a witness cannot refuse to answer, on the ground that his answers may expose him to civil forfeiture; that a witness can only refuse to answer on that ground as to acts such as would justify the party in entering as for a forfeiture; that a witness refusing to answer on the ground that his answers would expose him to a criminal charge, must swear that his answers will tend so to expose him; that here the defendant's grounds of refusal to answer were bad

(a) Which enacts, that, "in case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just."

as a demurrer to a bill for discovery in equity, inasmuch as the interrogatories did not tend to establish *acts* of forfeiture; and that the general answers professed to be given by the 11th and 12th paragraphs of the defendant's affidavit were evasive and unsatisfactory. [JERVIS, C. J.—It certainly is a very inconvenient mode of answering. The only proper course is, to answer each interrogatory categorically. We must hear what is said on the other side.]

Byles, Serjt., and *Skinner*, showed cause, upon an affidavit stating that the writ was served on the 20th of May, 1854; that the defendant appeared and obtained an order for particulars of breaches, which were delivered by the plaintiff on the 27th of May; that, with the exception of consenting to a judge's order that the cause should be tried in Middlesex, instead of Surrey, the plaintiff took no further steps in the action until the 7th of January last, when he served notice of *trial for [*248 the sittings after last Hilary Term, which was afterwards countermanded; that, pursuant to the rule of the 31st of January last, the plaintiff delivered the interrogatories brought before the court upon that occasion, adding thereto fifteen additional ones; that the defendant Susannah Wortley filed her answers on the 23d of February, and immediately gave notice thereof to the plaintiff; that, for nine weeks, the plaintiff took no steps to question the sufficiency of such answers; that, the plaintiff not having proceeded to the trial of the cause, the defendant's attorney served him on the 18th of April with notice, under the 101st section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, to proceed to the trial of the cause within twenty days, and that, in default thereof, he should sign judgment for the defendants; and that the plaintiff had only come with this motion after an unsuccessful attempt to obtain an enlargement of the time for proceeding to trial. They submitted, that, as far as regarded the alleged non-repair of the premises, and the carrying on of offensive trades therein, these might very well be proved without interrogatories, and that, as to the non-insurance, it was not reasonable that the defendant should be compelled to furnish evidence to support the plaintiff's case. And they insisted, that, at all events, the plaintiff was bound to come promptly to ask for the discretionary interference of the court, and was entitled to no favour. [JERVIS, C. J.—Unless Mr. *Chitty* can satisfactorily explain the great delay that has taken place, we shall certainly decline to exercise our discretion in his favour.]

Chitty admitted that his affidavit contained no explanation of the delay.

Per Curiam.

Rule refused.

***249] *AULTON and Another v. ATKINS. May 6.**

Covenant. The first count alleged that the defendant and one L. carried on business in copartnership, and that, by indenture between the defendant and L. of the first part, the plaintiffs of the second part, &c., it was witnessed that the defendant and L., and each of them, granted, assigned, and transferred to the plaintiffs all the copartnership stock, debts, sums of money, and all other the personal estate and effects and property of them the defendant and L. as such copartners. It then averred, that, at the time of the making of the indenture, the defendant was indebted to the copartnership in 240*l.*, being part of the debts, sums of money, and personal estate and effects and property of the defendant and L., as such copartners; and it assigned for a first breach, non-payment of the 240*l.*

There was a second breach, alleging that, at the time of the making of the indenture, a bill of exchange for 120*l.*, payable to the order of the defendant, and then being in the possession of the defendant, was part of the personal estate and effects and property of the defendant and L. as such copartners, and that the defendant made default in transferring the said bill of exchange, and the right to the money therein specified, to the plaintiffs, and, after the making of the indenture, incapacitated himself from so doing, and from conferring on the plaintiffs any right or title to receive the money specified in the said bill, by then parting with the possession of the said bill in such manner and on such terms as so to incapacitate himself, and thereby the defendant prevented the plaintiffs from acquiring or having any right or title as aforesaid to the said money, contrary to the said indenture:—

Held, on demurrer,—that there was no implied covenant on the part of the defendant to pay to the plaintiffs the sum due from him to the copartnership, and therefore that the defendant was entitled to judgment on the first breach,—but that there was an implied covenant on his part not to do anything in derogation of his deed, and therefore that the plaintiffs were entitled to judgment as to the second breach.

THE first count of the declaration stated, that, before and at the time of the making of the indenture thereafter mentioned, the defendant and George Leedham were copartners, and carried on the business of lace manufacturers in such copartnership; and thereupon, by a certain indenture made between the defendant and the said George Leedham of the first part, the plaintiffs of the second part, and certain other persons therein described of the third part, and sealed with the respective seals of the defendant and the said George Leedham, it was and is witnessed, that they, the defendant and George Leedham, did, and that each of them did, grant, bargain, sell, assign, transfer, and set over unto the plaintiffs, all and singular the copartnership stock in trade, fixtures, debts, sum and sums of money, and all other the personal estate and effects and property whatsoever of them the defendant and George
***250]** Leedham as such copartners: that, at the time of the making *of the said indenture, the defendant was indebted and accountable to the said copartnership in a large sum of money, to wit, 240*l.*, being part of the said debts, sum and sums of money, and of the personal estate and effects and property of the defendant and George Leedham as such copartners as aforesaid, which were so as aforesaid witnessed to be granted, bargained, sold, assigned, transferred, and set over; which sum of 240*l.* was then payable by the defendant to the copartnership: that the plaintiffs did all things necessary to entitle themselves to be paid the said money which the defendant so owed and was accountable for to the said copartnership as aforesaid, and that a reasonable time for the defendant to pay the same to the plaintiffs elapsed before this suit:

yet that the defendant made default in paying the same to the plaintiffs, and the same was still in arrear and unpaid to the plaintiffs, contrary to the said indenture. And the plaintiffs further said, that, at the time of the making of the said indenture, a certain bill of exchange, payable to the order of the defendant, for the sum of 120*l.*, and then being in the possession of the defendant, was, and the right to the money therein specified also was, part of the said personal estate and effects and property of the defendant and George Leedham, as such copartners, and the plaintiffs did all things necessary to entitle them to have the said bill of exchange, and the right to the money therein specified, transferred to them the plaintiffs by the defendant, and a reasonable time for the defendant so to transfer the same elapsed before this suit, and the defendant might have so transferred the same; yet that the defendant made default in transferring the said bill of exchange, and the right to the said money, respectively, to the plaintiffs, and, after the making of the said indenture, incapacitated himself from so doing, and from conferring on the plaintiffs any *right or title to receive the money [*251 specified in the said bill, by then parting with the possession of the said bill in such manner and on such terms as so to incapacitate himself, and thereby the defendant prevented the plaintiffs from acquiring or having any right or title as aforesaid to the said money, contrary to the said indenture.

The declaration also contained a count for money payable by the defendant to the plaintiffs for money received by the defendant for the use of the plaintiffs; and a count for the conversion by the defendant to his own use, or wrongfully depriving the plaintiffs of the use and possession of the plaintiffs' goods, that is to say, a bill of exchange, warping mills, and machines and machinery.

The defendant pleaded,—first, to the first and second breaches in the first count, that the supposed indenture was not his deed; secondly, to the first count, that is to say, the non-payment of the alleged debt of the defendant to the said copartnership, that, at the time of the making of the said indenture, he, the defendant, was not indebted or accountable to the said copartnership, as alleged,—thirdly, to the first breach, that a reasonable time for the defendant to pay the alleged money had not elapsed before this suit, as alleged,—fourthly, to the second count, that is to say, the alleged default in transferring the alleged bill, and the supposed cause of action relating thereto, that, at the time of making the said indenture, the alleged bill of exchange was not part of the personal estate or effects and property of the defendant and George Leedham, as such copartners, as alleged,—fifthly, to the second breach, that he was not guilty of the supposed breach therein complained of,—sixthly, to the second count, that is to say, the claim for money payable by the defendant, never indebted—seventhly, payment before action,—

*252] eighthly, a set-off. *And, to the last count, he pleaded not guilty, not possessed, and leave and license.

The defendant also demurred to the first count, the grounds of demurrer stated in the margin, being,—“that the said indenture did not operate as a legal assignment of the debt and bill of exchange mentioned in the first and second breaches, the same being choses in action, and the debt not being at law assignable, and the bill only being at law assignable by endorsement; and that the matters sued for were matters of partnership account, which could not be investigated at law; and that the first and second breaches showed no covenant or legal obligation by the defendant to pay the alleged sum, or transfer the alleged bill to the plaintiffs. Joinder.

Raymond, in support of the demurrer.—This is not a deed upon which any action at all will lie. It purports on the face of it to be a conveyance of certain property. There is nothing in it to enable the court to infer that it cannot operate: and, if so, no action lies. The declaration shows that the deed has operated: the parties have got all the benefit they contemplated under it. It is not a deed of covenant. In *Shepard's Touchstone*, c. 7, p. 162, it is said, “A covenant may be in the affirmative or in the negative. And it may be executed, *i. e.* that a thing is done already, or executory, *i. e.* that a thing shall be done [and either at one time or from time to time] hereafter; and these are all good. But, if it be of a thing present, as, if I covenant that my horse is yours, this is void. [This covenant amounts to a gift of the horse: *Plowd. Com.* 308 a; *Com. Dig. Covenant*, (A. 1).]” In *Vin. Abr. Covenant*, (G. 3), it is said,—“Covenant is, when a man covenants by deed to do or that he has done some thing; as, to make a feoffment, &c. But, if I covenant and grant with you that my black horse shall henceforward
*253] be your horse, *you shall have no action of covenant against me, though I retain the horse; for I have not covenanted to do anything in futuro, nor that anything was done in time past.” It will be said that this indenture contains an implied covenant, like the covenant for quiet enjoyment in a lease. But there can be no implied covenants as to personalty. In *Bac. Abr. Covenant*, (B), it is said, that, “if a man leases certain goods for years, by indenture, which are evicted within the term, yet he shall not have a writ of covenant; for the law does not create any covenant upon such personal thing:” and in the note in the margin the learned editor adds,—“And therefore, in case of a lease of a house, together with the goods, it is usual to make a schedule thereof, and affix it to the lease, and to insert a covenant from the lessee to redeliver them at the end of the term; for, without such covenant, the lessor can have no remedy but trover or detinue for them after the lease ended.” So here, there is nothing to which the deed can attach: and the court cannot make a contract for the parties different from that which they have made for themselves. The debts or liabilities contem-

plated by the deed, were not debts or liabilities of the partners inter se, but debts due from third persons to the firm. *Faulkner v. Lowe*, 2 Exch. 595,† is a much stronger case than this: it was there held, that no action will lie on a covenant by C. to pay a sum of money to A., B., and himself (C.), or the survivors or survivor of them on their joint account. Alderson, B., says: "This is not a covenant to pay A., B., or C., but to pay A., B., and C., on their joint account." And Pollock, C. B., adds: "The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself." [WILLIAMS, J.—I think you will find it more difficult to sustain that case than the case in hand.] The plaintiffs do not show that any accounts were taken between the partners: there is nothing to *show that the supposed debt was anything more than an equitable liability. [*254 As to the second breach, the bill of exchange was by law only assignable by endorsement.

Hayes, Serjt, *contra*.(a)—The argument on the other side amounts to this, that the deed in question cannot operate as a covenant if it operates a conveyance. The *property* in a debt (unlike the case put of the horse) does not pass by assignment: the right to have the debt only passes. The plaintiffs must have covenant on the deed, or no remedy at all. In *Deering v. Farrington*, 1 Mod. 113, 3 Keble, 304, 1 Freem. 368, the plaintiff brought an action of covenant, declaring upon a deed by which the defendant assignavit et transposuit all the money that should be allowed by any order of a foreign state to come to him in lieu of his share in a ship. Tompson moved that an action of covenant would not lie, for it was neither an *express* nor an *implied* covenant: *Cheiny & Langley's Case*, 1 Leon 179 (Cro. Eliz. 157, per nom. *Landydale v. Cheyney*). Hale, C. J.—"You should rather have applied yourself to this, viz., whether it would not be a *good covenant against the party? As, if a man doth *demise*, that is an implied covenant; but, if there be a particular express covenant that he shall quietly enjoy against all claiming under him, that restrains the general implied covenant; but it is a good covenant against the party himself. If I make a lease for years reserving rent to a stranger, an action of covenant will lie by the party to pay the rent to the stranger." It was further urged "that an assignment transferring where it cannot transfer, signifies nothing." Hale, C. J.—"But it is a covenant, and then it is

(a) The points marked for argument on the part of the plaintiffs, were,—

"1. That the deed operated as a covenant that the plaintiffs should have the money due from the defendant to the partnership, and also as a covenant that they should have the bill of exchange, —according to the cases of *Deering v. Farrington*, 1 Mod. 113, 3 Keble, 304, 1 Freem. 368, *Penson v. Jones*, Palmer, 388, *The Parishes of Calster and Eccles*, 1 Ld. Raym. 683, 1 Salk. 68.

"2. That the non-payment by the defendant to the plaintiffs of the debt, and the incapacitating himself from transferring the bill to the plaintiffs, and from giving the plaintiffs any title to the bill or the money therein specified, were breaches of the covenant:

"3. That the court might attribute the proper legal operation to the deed, as the declaration showed what the deed witnessed; and that, when that form of declaring is adopted, it is not necessary to aver the legal operation."

all one as if he had covenanted that he should have all the money that he should recover for his loss in such a ship." It is impossible to distinguish that case from this. No express form of words is required to make a covenant. "Demise" creates an implied covenant: so, a covenant that a man shall have a certain way, amounts to a grant of the way. "Any words in a deed, which show an agreement to do a thing, make a covenant: as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo provide the interest to A.; covenant lies against B. for the interest: Com. Dig. *Covenant*, (A. 2.)" In the case of *Caister and Eccles*, 1 *Ld. Raym.* 683, 1 *Salk.* 68, where a question arose as to the settlement of an apprentice who had been assigned,—whether he should be settled in the parish where his second master lived,—the justices at the sessions held that he should not, "because the apprentice is not assignable." But, per Holt, C. J., "though that be true, yet the first master might assign his apprentice; and, though that would not pass his interest in the apprentice, yet it is a good contract that the apprentice should serve the second master during the time, though the words are only grant and assign; like the case of assigning a bond, though it be not assignable *256] in point of interest, yet it is a covenant that *the assignee shall receive the money to his own use. To the same purpose is *Deering v. Farrington*. So, here, this assignment is a good agreement between the first and the second master that the apprentice should serve the time with the second. And so it is a service as apprentice, and so makes a good settlement." So, in *Seignorett v. Noguire*, 2 *Ld. Raym.* 1241, Holt, C. J., says: "If a man assigns a bond to J. S., and afterwards receives the money of the obligor, if he do not immediately pay it over to the assignee, the assignee may maintain an action of covenant against him upon the word assignment: and that was the case of *Deering v. Farrington*. So, if the obligee covenant to assign a bond to J. S. tiel jour, and will not assign it, or before the day receives the money of the obligor, by which means he has disabled himself to assign it; in either of these cases it is a breach of covenant; and yet in strictness a bond is not assignable." Parke, B., in the course of the argument in *Ward v. Audland*, 16 *M. & W.* 862, 872,† says, "*Deering v. Farrington* shows that an assignment and transfer of a chattel creates an implied covenant against the assignor and all who claim under him, though it may convey no title to the grantee." The same principle is recognised and acted upon in *Seddon v. Senata*, 13 *East*, 63. With regard to the bill of exchange, the same law applies. The bill was payable to the order of the defendant: the deed amounts to a covenant to endorse it. [CRESSWELL, J.—And so make himself liable upon it.] The second breach charges that the defendant has, in derogation of his deed, prevented the plaintiffs from obtaining the bill or the proceeds thereof. The circumstance of the 240*l.* being a debt due from one member of a firm

to another, makes no difference. The argument as to equity would equally apply to any debt that is assigned.

Raymond, in reply.—The cases cited are all *distinguishable from the present. They seem all to rest upon *Deering v. Far-riington*. There, however, the deed could have had no operation at all, unless it operated as a covenant; it did not appear that anything did or could pass by it. Here, the plaintiffs would have the right to use the name of the defendant to recover the debts. [*257]

A discussion arose as to whether the *whole* deed was set out in the declaration, or whether it was sufficiently set out according to its legal effect: and ultimately the court took time to consider.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This case was argued yesterday before my Brothers Crowder and Willes and myself. The first count of the declaration alleged that the defendant and one Leedham carried on business in copartnership, and that, by an indenture made between the defendant and Leedham of the first part, the plaintiffs of the second part, and certain other persons of the third part, it was witnessed that the defendant and Leedham, and each of them, granted, assigned, and transferred to the plaintiffs all the copartnership stock in trade, debts, sums of money, and all other the personal estate and effects and property of them the defendant and Leedham as such copartners. It then averred, that, at the time of the making of the indenture, the defendant was indebted to the copartnership in the sum of 240*l.*, being part of the debts, sums of money, and personal estate and effects and property of the defendant and Leedham, as such copartners, which were so as aforesaid witnessed to be granted, assigned, and transferred, and which sum of 240*l.* was then payable by the defendant to the copartnership; and it assigned for a first breach, non-payment of the *240*l.* There was a second breach, alleging [*258] that, at the time of the making of the indenture, a bill of exchange for 120*l.*, payable to the order of the defendant, and then being in the possession of the defendant, was part of the personal estate and effects and property of the defendant and Leedham as such copartners, and that the defendant made default in transferring the said bill of exchange, and the right to the money therein specified, to the plaintiffs, and, after the making of the said indenture, incapacitated himself from so doing, and from conferring on the plaintiffs any right or title to receive the money specified in the said bill, by then parting with the possession of the said bill in such manner and on such terms as to incapacitate himself, and thereby the defendant prevented the plaintiffs from acquiring or having any right or title as aforesaid to the said money, contrary to the said indenture. To this there was a demurrer: and we think that the plaintiffs are entitled to judgment upon so much of the demurrer as relates to the second breach.

As to the first breach, it appears to us that we cannot infer a covenant on the part of the defendant to pay to the plaintiffs the sum due from him to the copartnership. It is a joint covenant by the defendant and Leedham; and we cannot infer a covenant on the part of either to pay a debt due from either to the copartnership. So far, therefore, as concerns the first breach, we think our judgment must be for the defendant.

As to the second breach, however, we think the case of *Ward v. Audland*, 16 M. & W. 862,† calls upon us to give judgment for the plaintiffs. There, one Whitelock, by voluntary conveyance, assigned to the plaintiff, his executors, &c., his furniture, effects, &c., in trust, to the use of Whitelock, the settlor, for his life, and, at his death, in equal moieties, to the use of two nieces of Whitelock, named: and there was a covenant by Whitelock, for himself and his heirs and executors, to do
 *259] all *further reasonable acts and things for further and better assigning and transferring the said furniture, &c., to the plaintiff, on the same trusts as by the plaintiff or his counsel should be reasonably advised. Whitelock was in possession of the furniture, &c., till his death. On that event, the defendant, his executor, became possessed, and sold the whole. The plaintiff sued the defendant, as executor of Whitelock, on the above covenant for further assurance, averring in his declaration that it was at no time necessary to sell any of Whitelock's chattels to pay any debt of Whitelock, and that there were no creditors of his who could impeach the validity of the indenture, and assigning by way of breaches,—first, that the defendant refused to deliver possession of the furniture to the plaintiff,—secondly, that the defendant converted and sold the same, not alleging that he sold it in market overt. It was held that the plaintiff was entitled to recover, at least on the last breach, the value of the furniture possessed by Whitelock from the time of his executing the deed to his death, and afterwards sold by the defendant as his executor; though trover might have been sustained for the same cause of action. Parke, B., there said: “This case falls directly within what Lord Hale lays down in *Deering v. Farrington*, 1 Mod. 113, 1 Freem. 368, 3 Keble, 304. The law does not imply warranty of present title to assign, in cases of personal chattels; but a covenant to do all reasonable acts for further and better assigning and transferring chattels conveyed by the deed, means merely that neither the covenantor nor those claiming under him will do anything to interrupt the quiet enjoyment of the chattels by the parties contemplated by the deed. Here, by the defendant's sale, he did interrupt all such enjoyment. The defendant is in the same position as if the present covenant for further assigning and transferring the chattels
 *260] had been for the *grantor and covenantor to hold them per auter vie, and he had then himself destroyed them. In that case, according to Lord Hale, the covenant could be enforced as such against

the grantor and all parties claiming under him. In the last breach, the defendant is charged with keeping and retaining possession of the chattels claiming the ownership thereof as executor as aforesaid, that is, under the testator, who is the covenantor. If *Deering v. Farrington* is law, the covenant has been broken." So, here, there is an implied covenant on the part of the defendant not to do anything in derogation of his deed. He did something in derogation of his deed, when he parted with the possession of the bill of exchange in such manner and upon such terms as to incapacitate himself, and thereby to prevent the plaintiffs from acquiring or having any right or title to the money therein specified. If it could be said that there was no covenant on the part of the defendant and Leedham, as was urged by Mr. *Raymond*, it might perhaps be contended that the property vested absolutely in the plaintiffs, and therefore the count might be treated as a roundabout and informal count in trover; and in either view the plaintiffs would be entitled to succeed upon that part of the case.

Upon the whole, we think there should be judgment for the defendant on the demurrer as to the first breach in the first count, and for the plaintiffs on the demurrer as to the second breach.

Judgment accordingly.

***ASHCROFT v. FOULKES.** *April 17.*

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Unless the plaintiff, in an action of contract for which a plaint might have been entered in the county court, recovers more than 20*l.*, whatever the amount of his claim, and whether reduced by payment, by tender, or by set-off, he is by the 11th section of the 13 & 14 Vict. c. 61, deprived of costs, unless the judge certifies at the trial, under s. 12, or he obtains a rule or order under the 15 & 16 Vict. c. 54, s. 4.

Upon a rule to rescind an order for a review of the master's taxation, it being objected that neither the rule nor the affidavits upon which it was drawn up disclosed what the taxation was,—The court, in the exercise of their discretion under the 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and without imposing any terms, ordered the *allegatur* to be produced for their inspection.

PETERSDORFF, in Hilary Term last, obtained a rule calling upon the defendant to show cause why an order of Coleridge, J., dated the 7th of December last, ordering "that the master do review his taxation herein," should not be rescinded,—referring to *Woodhams v. Newman*, 7 C. B. 654 (E. C. L. R. vol. 62), *Beswick v. Capper*, 7 C. B. 669, and *Avards, App., Rhodes, Resp.*, 8 Exch. 312.†

The motion was founded upon two affidavits of the plaintiff's attorney, the first of which,—after setting out a duplicate of the order, and the particulars of the plaintiff's demand, by which he claimed a sum of 17*l.* 10*s.* 2*d.*, as the balance of an account of 37*l.* 10*s.* 2*d.*, for work and labour and materials, after giving "credit by bill of exchange for 20*l.* drawn by defendant on and accepted by plaintiff, dated 4th October, 1854, at four months,"—stated that the action was brought to recover

17*l.* 10*s.* 2*d.*, being the balance of account due to the plaintiff after allowing to the defendant the sum of 20*l.*, the amount of an acceptance of the plaintiff which the defendant had discounted for him; that, on the trial of the cause, the plaintiff proved his demand, amounting to 87*l.* 10*s.* 2*d.*, but which was reduced by payments and by the said set-off to the sum of 4*l.*, for which a verdict was given for the plaintiff; and that, at the time of the commencement of this action, the bill of exchange which was allowed as a set-off to the defendant, was alleged to be in the hands of one John Croft, who had brought an action against *262] the plaintiff to recover the *same, which action had proceeded to issue, and was still pending. The other affidavit stated, that the writ of summons in this action was endorsed as follows,—“The following are the particulars of the plaintiff’s claim:—17*l.* 10*s.* 2*d.*, balance for work and labour done and performed and materials provided by the plaintiff for the defendant, at his request, from 1853 to 1855, after giving defendant credit for 20*l.* cash advanced to the plaintiff by the defendant on the plaintiff’s acceptance to a bill of exchange dated 4th October, 1854;” that it was proved by the plaintiff in his evidence on the trial of this cause, and admitted by the defendant in his evidence, that the bill of exchange for which credit was given in the plaintiff’s particulars of demand, was a bill of exchange drawn by the defendant upon and accepted by the plaintiff, and that the said bill of exchange had been discounted by the defendant for the plaintiff; that the said bill of exchange had never been allowed in the settlement of accounts between the plaintiff and the defendant; and that there had been no agreement before action for the allowance of the amount of the said bill as a payment.

Hawkins, contra, took a preliminary objection, that the affidavits upon which the rule was obtained did not show upon what ground the order sought to be rescinded was made, and therefore did not show that it was improperly made.—[JERVIS, C. J.—It is quite obvious that the master has allowed the plaintiff his costs, and that my Brother Coleridge thought that they ought to have been disallowed.] That does not appear: the master’s allocatur is not before the court. [JERVIS, C. J.—Under the 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, “upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his *263] discretion, and *upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *vivâ voce*, either before such court or judge, or before the master, and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just,” I think we may require the allocatur to be produced, in order that we may see what the master has done.] At least the other

side should pay the costs of the motion. [JERVIS, C. J.—If you have a more substantial answer to the rule, you had better proceed.]

The allocatur showed that the master had taxed the plaintiff's costs at 14*l.* 8*s.*

Hawkins then proceeded to show cause, upon an affidavit stating that it was agreed, before the commencement of the action, between the plaintiff and the defendant that the defendant should be allowed the amount of the bill of exchange for 20*l.* as a payment on account of the work done by the plaintiff for the defendant.—Whether or not the plaintiff was entitled to costs will depend upon two questions,—first, whether the balance had been agreed between the parties to be reduced by set-off or payment to a less sum than 20*l.*,—secondly, whether the plaintiff has recovered more than 20*l.* within the meaning of the county court acts. 1. The affidavits in answer to the rule show distinctly that it was agreed between the parties, before the commencement of the action, that the bill for 20*l.* should be allowed as payment. 2. Assuming there had been no agreement on the subject, but that the 20*l.* was a mere matter of set-off reducing the verdict below 20*l.*, the plaintiff would still not be entitled to costs. He has in fact recovered 4*l.* only. Including the 20*l.*, the sum sought to be recovered in the action was 37*l.* 10*s.* 2*d.*, *a sum over which the county court might have had jurisdiction. This is not like the case of *Avards*, App., *Rhodes*, Resp., 8 [*264 Exch. 312,† where the claim originally exceeded 50*l.* Here, the original claim was for a sum within the jurisdiction of the county court. [JERVIS, C. J.—Between 20*l.* and 50*l.*, there is now concurrent jurisdiction, provided the sum recovered exceeds 20*l.* Is there any difference in the meaning of the word “recovered,” whether the amount claimed is 5*l.* or 5000*l.*?] The 129th section of the first county court act, 9 & 10 Vict. c. 95, enacted, “that, if any action should be commenced after the passing of that act in any of Her Majesty's superior courts of record, for any cause other than those lastly thereinbefore (s. 128) specified, for which a plaint might have been entered in any court holden under that act, and a verdict should be found for the plaintiff for a less sum than 20*l.* in contract, or less than 5*l.* in tort, the said plaintiff shall have judgment to recover such sum only, and no costs.” The 11th section of the county courts extension act, 13 & 14 Vict. c. 61, enacts, “that, if, in any action commenced after the passing of this act in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall *recover* a sum not exceeding 20*l.*, or if, in any action commenced after the passing of this act, in any of Her Majesty's superior courts of record, in trespass, trover, or case, not being for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall *recover* a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs,

except in the cases hereinafter provided, and except in the cases of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any *265] such plaintiff be entitled *to costs by reason of any privilege as attorney or officer of such court, or otherwise." The exceptional cases there referred to are those contained in the 12th and 13th sections. The 12th section provides and enacts, "that, if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, *by verdict*, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed." And the 13th section also provided and enacted, "that, if in any such action, whether there be a verdict in any such action or not, the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county court, or that the cause was removed from a county court by certiorari, then and in any of such cases the court in which the said action is brought or the said judge at Chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed." This last-mentioned section *266] is repealed by the 15 & 16 Vict. c. 54, s. 4, which then proceeds to enact, that, "in any action in which the *plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such act [13 & 14 Vict. c. 61], whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county courts, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing such action in the court in which such action was brought, then, and in any of such cases, the court in which such action is brought, or the said judge at Chambers, shall thereupon, by rule or order, direct that the plaintiff shall recover his

costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vict. c. 61, had not passed." The sum *recovered*, it is submitted, within the meaning of the 11th section of the 13 & 14 Vict. c. 61, is, the balance of the claim after allowing the payment or set-off,—the amount for which the verdict is given: *Wallen v. Smith*, 8 M. & W. 138;† *Parker v. Serle*, 6 Dowl. P. C. 334; *Dixon v. Walker*, 7 M. & W. 214.† The plaintiff might have gone to the county court. He has recovered less than 20*l.*, and he has not obtained a certificate under the 12th section of the 13 & 14 Vict. c. 61, or a rule or order under the 4th section of the 15 & 16 Vict. c. 54, and therefore is entitled to no costs.

Petersdorff, in support of his rule.—The argument on the other side, is, that, where the plaintiff's claim exceeds 20*l.* and is less than 50*l.*, he is by virtue of the *11th section of the 13 & 14 Vict. c. 61, [*267 disentitled to costs, unless he *recovers* more than 20*l.* The proviso in the 13th section, which enabled the court or judge, where it appeared that the action was brought for a cause in which there was concurrent jurisdiction given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in the county court, to allow the plaintiff his costs, is repealed by the 4th section of the 15 & 16 Vict. c. 54, which directs that the court or judge *shall* make an order for costs, if there was concurrent jurisdiction under s. 128 of the 9 & 10 Vict. c. 95, or if no plaint could have been entered, or if there was sufficient reason for bringing the action in the superior court. This is a case in which there was concurrent jurisdiction. [CRESSWELL, J.—Not given by s. 128 of the 9 & 10 Vict. c. 95, in such a case as this: therefore that provision does not help you.] There certainly is a difficulty where the sum recovered is under 20*l.* [JERVIS, C. J.—The question is, was it reasonable for the plaintiff to sue in the superior court?] Where the amount of the debt is reduced by set-off below 20*l.* or 50*l.* respectively, it has been repeatedly held that the county court has no jurisdiction: *Woodhams v. Newman*, 7 C. B. 654 (E. C. L. R. vol. 62); *Beswick v. Capper*, 7 C. B. 669; *Avards*, App., Rhodes, Resp., 8 Exch. 312.† And the same principle must apply to costs. [JERVIS, C. J.—Under the 9 & 10 Vict. c. 95, the provision as to costs was coupled with this, that the county court had jurisdiction. The 11th sect. of the 13 & 14 Vict. c. 61, studiously omits the words "for any cause, other than, &c., for which a plaint might have been entered in any court holden under this act," which are found in the 9 & 10 Vict. c. 95, s. 129.] *Cur. adv. vult.*

*JERVIS, C. J., now delivered the opinion of the court.(a)—We have considered this case, which was argued yesterday, and have [*268 come to the conclusion that the rule should be discharged. It was an

(a) Consisting of Jervis, C. J., Cresswell, J., Crowder, J., and Willes, J.

application to rescind an order of my brother Coleridge directing a review of the taxation, the master having allowed the plaintiff his costs, although he recovered only 4*l.*, and there was no certificate. The order for a review was resisted upon the ground that the amount claimed originally, 37*l.* 10*s.* 2*d.*, had been reduced below 20*l.* by a set-off. There was a preliminary question raised before us, viz. whether the amount by which the verdict was reduced was to be dealt with as an admitted payment, or was strictly a set-off. But, independently of that, the more important question arose, as to the effect of the recovery where the amount was reduced by set-off, and not by payment. It was contended by Mr. *Hawkins*, that, upon the true construction of the 13 & 14 Vict. c. 61, s. 11, the *recovery* was to be the criterion: and we are of that opinion. The 129th section of the first county court act, 9 & 10 Vict. c. 95, enacted, that, if any action should be commenced in a superior court for any cause (other than those provided for by the concurrent jurisdiction clause, s. 128) for which a plaint might have been entered in the county court, and a verdict should be found for the plaintiff for a less sum than 20*l.* if the action is founded on contract, or less than 5*l.* if it be founded on tort, the plaintiff should have judgment to recover such sum only, and no costs. Under that section, the only way of depriving the plaintiff of costs, was, by a motion for leave to enter a suggestion on the roll. That being found to be attended with great *269] inconvenience, the law was amended *in that respect by the 13 & 14 Vict. c. 61, the 11th section of which enacted, "that, if in any action commenced after the passing of that act in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if, in any action commenced after the passing of that act in any of Her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases thereafter (in ss. 12 and 13) provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs," &c. The 12th section provides that the judge at the trial may certify to entitle the plaintiff to costs, though he should recover less than the sums before mentioned, if it appears to him that the cause of action is one for which a plaint could not have been entered in the county court, or that there was a sufficient reason for bringing the action in the superior court. And s. 13 provided, that, if the plaintiff should make it appear to the satisfaction of the court or a judge that the action was brought for a cause in which concurrent jurisdiction was given to the superior courts by the 9 & 10 Vict. c. 95, s. 128, or

for which no plaint could have been entered in the county court, or that the cause was removed by certiorari, the court or judge *might* by rule or order direct that the plaintiff should recover his costs. Then came the 15 & 16 Vict. c. 54, the 4th section of which repealed the 13 & 14 Vict. c. 61, s. 13, and substituted for it the following provision, viz. that, "in any action in which the plaintiff shall not be entitled to recover **his* costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, whether there be a verdict in such action [**270* or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county courts, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing such action in the court in which such action was brought, then and in any of such cases the court in which such action is brought, or the said judge at Chambers, *shall* thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vict. c. 61 had not been passed."

We think, that, under the 13 & 14 Vict. c. 61, s. 11, the amount *recovered* is the criterion to guide the master; and that, when he sees that the sum recovered is under 20*l.*, and there is no certificate, and no rule or order under the 4th section of the 15 & 16 Vict. c. 54, he is not to allow the plaintiff any costs. That construction, in my opinion, satisfies every provision of the act. In the present case, the plaintiff has brought an action in the superior court, for which a plaint might have been entered in the county court; and he has recovered less than 20*l.* He, therefore, is entitled to no costs. Rule discharged.

Petersdorff (who was not present when the judgment was delivered), at the close of the day called the attention of the court to a case of *Tonge v. Chadwick*, 2 **Jurist*, N. S., 282, in which the Court of Queen's Bench was supposed to have adopted a view not in accordance with that of this court in the above case. There, the plaintiff brought his action for 80*l.* The defendant pleaded never indebted, and a set-off for money due from the plaintiff to the defendant and one John Ackroyd. At the trial, the plaintiff established a claim of 24*l.* 13*s.*; but the defendant proved so much of his set-off as reduced the debt to 4*l.* 14*s.* 7*d.* No application was made to the judge to certify. And the court allowed the plaintiff his costs, to be taxed upon the lower scale.

JERVIS, C. J.—If you had read that case, you would have found that
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it is quite consistent with the decision we came to this morning. Lord Campbell there says: "According to the natural meaning of words 'the sum recovered' by the plaintiff was 4*l.* 14*s.* 7*d.* The plaintiff established a claim against the defendant for 24*l.* 18*s.*, but the defendant reduced it by the amount of his set-off, for which the plaintiff had credit, to 4*l.* 14*s.* 7*d.*, and for that sum only was judgment recovered. Surely that is the sum recovered by the plaintiff, and not 24*l.* 18*s.* There is nothing to prevent us from giving to the words their natural meaning, and convenience requires that we should look to the balance as the sum due and the sum recovered. The plaintiff was defeated to a certain extent; and, if the amount of his claim had been overtopped, the defendant would have had a verdict, and the plaintiff would have had no costs; and all that we say now, is, that his costs shall be taxed on the lower scale. The cases on the county court act only decided, that, the original claim being above 20*l.*, the county court had no jurisdiction to try the cause; and then we have the decision of Parke, B., in *Parker v. Serle*, *272] 6 Dowl. P. C. 834, that the balance is to be *considered the sum recovered within the meaning of the directions to the taxing officers."

Petersdorff.—The master had allowed the plaintiff his costs on the higher scale. The argument urged by Mr. *Hawkins* was,—first (as here), that, the plaintiff having recovered less than 20*l.*, he was deprived altogether of costs by the 13 & 14 Vict. c. 61, s. 11, in the absence of a certificate of the judge under s. 12,—secondly, that, he was at all events only entitled to costs on the lower scale: and *Lush*, who showed cause, was desired by the court to confine his argument to the second point.

JERVIS, C. J.—The judgment in that case shows that the Court of Queen's Bench, when the question comes properly before them, will decide it in exact accordance with our view. They rest upon the construction of the word "recovered."

In the matter of JOHN COLLINS. April 24.

Where an attorney has been struck off the roll of the Court of Queen's Bench for misconduct, he will, on production of the rule for that purpose, be struck off the roll of this court.

H. J. HODGSON moved that John Collins, an attorney of this court, might be struck off the roll of this court, upon the production of a rule striking him off the roll of the Court of Queen's Bench for misconduct. He referred to the case of John Whitehead, 4 M. & G. 768 (E. C. L. R. vol. 43), 5 Scott, N. R. 239, where a similar application was granted upon the mere production of the rule of the Court of Queen's Bench.

JERVIS, C. J.—Out of deference to that court, we do not inquire into the circumstances upon which they acted. The rule may go.

Rule absolute.

***MATHER v. LORD MAIDSTONE.** *April 29.* [*273]

A. accepted a bill for 1000*l.* for the accommodation of B. A bill for that amount, purporting to be drawn by B. and accepted by A., and by B. endorsed to C., and by C. to D. (for value), was afterwards presented to A. for payment. A. having had an opportunity of inspecting the bill, gave D. a check for 100*l.* and a renewed bill at three months (similarly drawn and endorsed), for 1000*l.*, in exchange for the bill so presented to him. A. afterwards discovered that the acceptance to the bill so delivered up to him was forged:—Held, no answer to an action at the suit of C. upon the substituted bill.

THE declaration stated that the Hon. Francis Charles Lawley, on the 17th of March, 1855, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him, the said Hon. Francis Charles Lawley, or his order, 1000*l.*, three months after date, for value received; that the defendant accepted the said bill, and the said Honourable Francis Charles Lawley endorsed the same to one Edward Rawson Clark, who endorsed the same to the plaintiff; but that the defendant did not pay the same.

The defendant pleaded, that, before the date of the said bill of exchange in the declaration mentioned, he, the defendant, had accepted two bills of exchange for the accommodation of the Hon. Francis Villiers, each of the said bills being drawn by the said Francis Villiers, and endorsed by the said Edward Rawson Clark, and being respectively for the amount of 1000*l.*, and respectively payable three months after the respective dates thereof; that, after he, the defendant, had so accepted the said two bills of exchange, and before the date of the said bill of exchange in the said declaration mentioned, he the defendant, received and had notice that a bill of exchange drawn by the said Francis Villiers, endorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, for the sum of 1000*l.*, payable three months after date, had become due and payable, and he, the defendant, was required to pay the same to the plaintiff, who then was the holder of the last-mentioned bill of exchange; that thereupon, the defendant, believing that the last-mentioned bill of exchange was one of the said two bills of exchange *so accepted by him for the accommodation of the said Francis Villiers as aforesaid, paid to the plaintiff 100*l.* [*274 for interest thereon, and accepted the said bill of exchange in the declaration mentioned, in consideration of his supposed liability to the plaintiff upon the said bill whereof he the defendant had notice as aforesaid, and by way of renewal thereof, and for no other consideration whatever; that the said Hon. Francis Charles Lawley drew and endorsed the said bill, and the said Edward Rawson Clark endorsed the said bill of exchange in the declaration mentioned, for and on account of the said bill of exchange whereof he, the defendant, had notice as aforesaid, and by way of renewal thereof, and not otherwise, nor for any other consideration whatever; that the said bill of exchange whereof he had notice as aforesaid was not either of the bills accepted by him for the accommodation of

the said Francis Villiers as aforesaid, and was not accepted by him, the defendant, nor by his authority, but that his name had been written on the said bill without his knowledge, consent, or authority, and that he first discovered that the said bill was not accepted by him, or by his authority, after he had accepted the said bill of exchange in the declaration mentioned, and after the same had been delivered to the plaintiff; and that he, the defendant, then, and within a reasonable time, gave the plaintiff notice that the said bill of exchange whereof he the defendant had notice as aforesaid, was not accepted by him, nor by his authority, and that he had accepted the said bill of exchange in the declaration mentioned under the mistaken belief as aforesaid, and then demanded the same of and from the plaintiff to be delivered up to him the defendant, but the plaintiff refused to deliver up the same: and so the defendant said that he accepted the said bill of exchange in the said declaration *275] mentioned under the mistaken belief *that the said bill of exchange whereof he had notice as aforesaid, was accepted by him, the defendant, and that he was liable to pay the amount of the same; and that he never received any consideration for the acceptance of the said bill of exchange in the declaration mentioned, or for payment of the same, or of any part thereof, save as aforesaid; and that there never was any consideration for the drawing or endorsements of the said bill of exchange, save as aforesaid; and that the plaintiff never gave any value or consideration for the same, or for any part thereof, save as aforesaid.

For a second replication to the defendant's plea, the plaintiff said, that, when the said bill of exchange drawn by the said Francis Villiers, and endorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, in the said plea mentioned, became due and payable according to the tenor and effect thereof, the plaintiff was the lawful holder thereof, and then presented or caused to be presented the last-mentioned bill to the defendant for payment thereof; and that the plaintiff had not at that time, or at the time when the last-mentioned bill was given up by the plaintiff to or for the defendant as thereafter mentioned, any notice, nor did he know or believe, nor had he reason to believe, that the signature of the defendant's name upon the last-mentioned bill purporting to be his acceptance of the same, was not the defendant's genuine signature and acceptance, or that the defendant was not liable thereon as the acceptor of the last-mentioned bill; and that, after the said presentment of the last-mentioned bill for payment as aforesaid, and before the same was given up to or for the defendant, as thereafter mentioned, and whilst the plaintiff was the lawful holder thereof, the defendant, at his request, and by the sufferance and permission of the plaintiff, inspected the last-mentioned bill, then having *276] the supposed acceptance of *the defendant thereon, and the defendant received and took the same into his hands for that purpose, and

did not say or suggest that the said supposed acceptance was a forgery, or that his name had been written on the last-mentioned bill, without his knowledge, consent, or authority, or that he was not liable thereon as the acceptor thereof, but complained to the plaintiff that the said Edward Rawson Clark had not renewed the last-mentioned bill before it became due, and then informed the plaintiff that he the defendant had before then given the said Edward Rawson Clark another acceptance, and a check for 100*l.*, for the purpose of renewing the same; that the said conduct and behaviour of the defendant on the occasion aforesaid, and his conduct next thereafter mentioned, respectively, confirmed the plaintiff in his the plaintiff's belief that the acceptance of the said bill in this replication first aforesaid was the genuine signature and acceptance of the defendant, and that he was liable thereon as the acceptor of the last-mentioned bill, and induced the plaintiff to act, and the plaintiff did accordingly and in consequence thereof act as thereafter alleged; that, after the lapse of eight days after the defendant had so inspected the last-mentioned bill, the defendant, by and through the said Edward Rawson Clark, his the defendant's agent in that behalf, by way of renewal or payment of the last-mentioned bill, delivered to the plaintiff the said bill in the declaration mentioned, so drawn, accepted, and endorsed as therein alleged, and paid to the plaintiff the sum of 60*l.* upon and in respect of the said renewal, and the plaintiff, in consideration thereof, and at the request of the defendant, by the said Edward Rawson Clark, his agent in that behalf as aforesaid, delivered to the said Edward Rawson Clark, as and being such agent as aforesaid, who then, as such agent as aforesaid, took and received, respectively, for and on behalf of the defendant, the said *bill of exchange in this replication first above mentioned as being renewed, paid, satisfied, [*277 or discharged by the said bill of exchange in the declaration mentioned so delivered to the plaintiff as aforesaid; that the said bill of exchange so given up by the plaintiff to or for the defendant as aforesaid, had never been returned by the defendant, or otherwise howsoever to the plaintiff; and that the defendant did not give the plaintiff notice, nor did the plaintiff receive notice, nor did he know or believe, nor had he reason to believe, that the last-mentioned bill was not accepted by him, the defendant, or by his authority, until thirty days had elapsed after the same had been so as aforesaid delivered to and received by the said Edward Rawson Clark, as such agent as aforesaid.

The defendant, as to the second replication to his said plea, said, that, from the time of his first discovering that the said bill of exchange so given up by the plaintiff as aforesaid had not been accepted by him, the defendant, or by his authority, he was, and from thence hitherto had been, and still was, ready and willing to return the said bill so given up by the plaintiff, to him the plaintiff, but that the plaintiff never demanded the same, nor requested that the same might be returned to him.

To this rejoinder, the plaintiff demurred.

*278] *Phipson*, in support of the demurrer. (a)—The point *raised by these pleadings, is, whether a person who accepts a bill in exchange for another bill purporting to bear his acceptance, and which he had full opportunity of inspecting, is liable to be sued by a holder for value of such substituted bill. It appears, that, at the time the first bill was presented to the defendant for payment, the plaintiff had a remedy thereon against the drawer and the first endorser; and that the defendant inspected the bill when presented to him, but made no objection that the acceptance was not his, but merely complained that Clark had not renewed it in a given manner. If the defendant had *paid* the bill, he clearly could not under the circumstances have recovered back the money, unless he could have brought himself within the exception to the rule, established by *Kelly v. Solari*, 9 M. & W. 54,† viz. that the payment was made under a *bonâ fide* *279] *forgetfulness* of facts which disentitled the recipient to receive the money; and, if that be so, he clearly has no answer to an action upon this bill. [WILLES, J.—The defendant will probably rely upon *Milnes v. Duncan*, 6 B. & C. 671 (E. C. L. R. vol. 18), 9 D. & R. 731 (E. C. L. R. vol. 22). A bill of exchange was drawn in Ireland upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in England; but there was nothing on the face of the bill to show that it had been drawn in Ireland. The holder in England neglected to present it for payment, and held it a month after it was due. The acceptor having become bankrupt, the holder applied for payment to the endorser who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp.

(a) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the second rejoinder is bad in substance, and is no answer to the second replication; that it confesses all the facts stated in the second replication, and does not avoid them; that it admits that plaintiff gave, and defendant received, consideration for the bill sued upon; that it is therefore immaterial whether or not the defendant offered to return the first bill, or whether or not the plaintiff was prejudiced; and that, if plaintiff's being prejudiced is material, the rejoinder admits he was prejudiced, as he was deprived of the bill and of his remedies upon it for a period of thirty days.

"2. The plaintiff will contend, if necessary, that the defendant's plea is bad in substance; that the plea shows the defendant admitted the genuineness of the acceptance of the first bill, by renewing or paying it, and therefore he cannot now, in the absence of fraud, set up the forgery, to defeat the bill given by way of renewal; that the plea does not allege that the discovery of the first bill being a forgery was made, or that notice thereof was given to the plaintiff, in a reasonable time after notice to the defendant of that bill being overdue and unpaid; that it does not allege that the defendant was ready and willing to return the first bill within a reasonable time after it had been given up to him; and that it does not allege that the defendant ever offered to return the first bill, or to replace the plaintiff in his former position.

"3. The plaintiff will also contend, if necessary, that his second replication is good in substance, and is a complete answer to the defendant's plea; that it shows that the plaintiff gave, and the defendant received, consideration for the bill sued upon; that, in the absence of fraud, the contract was and is binding, particularly as the parties could not, after the lapse of time, be restored to their former position; and that the defendant, under the circumstances stated in the replication, is not at liberty to set up the alleged forgery."

The endorser inspected the bill, and, finding that the stamp was not that required for a bill of the same amount drawn in England, but ignorant of the fact that it had been drawn in Ireland, paid the amount to the holder. It was held, that this was money paid in ignorance of the fact, and, there being no laches imputable to the party who paid the money, he might recover it back in an action for money had and received.] That case ranges itself within the general rule, that money paid in ignorance of the facts may be recovered back. But the cases have engrafted an exception upon the exception in *Kelly v. Solari*,—that, where there has been negligence in the party making the payment, and there has been no bad faith and no laches on the part of the person receiving it, the money cannot be recovered back. No case, however, is to be found where an acceptor who has paid a bill believing it to be genuine, has afterwards been allowed to recover it back. In *Price v. Neal*, 3 Burr. 1355, 1 W. Bl. 390, *the plaintiff sought to recover [*280 back from the defendant 80*l.* which had been received by him under the following circumstances:—Two bills for 40*l.* each drawn upon the plaintiff, and one of them accepted by him payable at his banker's, being in the hands of the defendant as holder for value, were presented at maturity, and paid. The drawee afterwards discovered that the drawer's name to both bills was forged by one Lee, who was hanged for the forgery. Lord Mansfield said: "This is an action upon the case for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it: and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange endorsed to him for a fair and valuable consideration, which he had *bonâ fide* paid, without the least privity or suspicion of any forgery. Here was no fraud, no wrong. It was incumbent upon the *plaintiff* to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but it was not incumbent upon the *defendant* to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bonâ fide* discounts it. The defendant lies by for a considerable time after he has paid these bills, and then found out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the *whole value *bonâ fide*. It is a misfortune which has happened [*281 without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one

innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant." That case bears a very close resemblance in point of principle to this. Again, in *Smith v. Mercer*, 1 Marsh. 453 (E. C. L. R. vol. 1), 6 Taunt. 76 (E. C. L. R. vol. 4), a bill of exchange with a forged acceptance purporting to be payable at the house of A. & Co., bankers in London, with whom the supposed acceptor kept cash, was endorsed to B. for a valuable consideration: B. endorsed it to his agent in London, who presented it on the 23d of April at the house of A. & Co. for payment: A. & Co. paid it, and sent it on the 30th of April to the supposed acceptor, who disavowed it: A. & Co. immediately gave notice of the forgery to B., and demanded repayment, which B. refused: all parties were ignorant of the fraud: and it was held, that A. & Co., by paying the bill, without ascertaining that the acceptance was genuine, were precluded from recovering the amount from B. [JERVIS, C. J.—On what ground?] One ground was, that the position of the holder might be altered to his prejudice: another and broader ground was, that it was the bankers' duty to know the handwriting of their customer. In *Jones v. Ryde*, 5 Taunt. 488 (E. C. L. R. vol. 1), 1 Marsh. 157 (E. C. L. R. vol. 4),—where it was held that a person who discounts a forged navy bill for another who passed it to him without knowledge of the forgery, might recover back the money as had and received to his use upon failure of the consideration,—Gibbs, C. J., said: "This is very distinguishable from the case of *Price v. Neal*, because there the bill was paid by the person who of all others was the best judge whether the acceptance was his handwriting or not, and he *282] says, on looking at *it, this is my handwriting, and I pay it." [CRESSWELL, J., referred to *Cocks v. Masterman*, 9 B. & C. 902 (E. C. L. R. vol. 17), 4 M. & R. 676. There, a bill purporting to have been accepted by A., was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of A., paid the amount, but, on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money: and it was held that they were not entitled to recover it back.] That proceeded upon the narrower ground, that the holder was entitled to know, on the day on which the bill becomes due, whether it is honoured or dishonoured, least his remedies against other parties on the bill should be impaired. [JERVIS, C. J.—The narrower ground is sufficient for your purpose in the present case.] The case of *Wilkinson v. Johnson*, 3 B. & C. 428 (E. C. L. R. vol. 10), 5 D. & R. 403 (E. C. L. R. vol. 16), which was there relied on for the plaintiffs, was distinguished by Bayley, J., on the ground that there notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on

that day. Abbott, C. J., in the last-mentioned case expressly recognises *Price v. Neal* and *Smith v. Mercer*. There is another ground upon which the defendant would be estopped from setting up this defence. If a mistake of fact would authorize him to recover back the money after the lapse of thirty days, there would be nothing to prevent his recovering it back at any time within six years. The cases upon this subject will be found collected in *Freeman v. Cooke*, 2 Exch. 654,† where the Court of Exchequer qualify the rule laid down by the Court of Queen's Bench in *Pickard v. Sears*, 6 Ad. & E. 474 (E. C. L. R. vol. 33), 2 N. & P. 486, and that class of cases. And see the judgment of Abbott, C. J., in *Skyring v. Greenwood*, 4 B. & C. 281 (E. C. L. R. vol. 10), 6 D. & R. 401 (E. C. L. R. vol. 16). *Reliance will probably be placed on the other side upon the case of *Bell v. Gardiner*, 4 M. & G. 11 (E. C. L. R. vol. 43), 4 Scott, N. R. 621, where it was held that a negotiable security given by a party in satisfaction of a liability from which he was discharged in law, in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the *means* of knowing those facts. The cases here relied on, however, were not cited there: besides, the acceptor was discharged, as well as the drawer; the note was given for a bill which was absolutely worthless, the defendant not knowing it to be worthless. [The rejoinder was abandoned.]

Macnamara, contrà.(a)—The plea affords a sufficient answer to the declaration, and the replication is no answer to the plea. The fact that the bill declared on was given by the defendant on a mistake of facts, *prima facie* affords an answer to the action. *Bell v. Gardiner* is a strong authority in favour of the defendant; and it is not successfully distinguished from the present on the *ground that the bill in substitution for which the note there was given, was a mere piece of waste paper: the bill was not necessarily void by reason of the alteration. [*284]

(a) The points marked for argument on the part of the defendant, were as follows:—

"1. That the plea affords a good answer to this action, as it alleges that the bill of exchange sued upon was accepted by the defendant under a mistake of facts: and that the plea is also a good answer to the action, as showing that there was no consideration for the acceptance of the bill upon which this action is brought.

"2. That it does not appear by the replication that there was any consideration for the acceptance of the bill sued upon, or that the plaintiff has been prejudiced by the defendant's conduct or representation: that the mere fact of the plaintiff's not having had in his possession the bill given up, for the period of thirty days, was not necessarily a prejudice to him, especially as it appears that he received the sum of 100*l.* for the renewal thereof: that it does not appear that the plaintiff was delayed in or deprived of his remedy upon the bill given up: that it does not appear that the plaintiff's not suing upon the bill given up was any prejudice to him: that the plaintiff ought positively to have shown that he was prejudiced by having given up the bill, and that such prejudice was caused by the defendant's wilful misrepresentation, or at his request, or for his benefit, or that there was in some other way a consideration for the acceptance of the bill sued upon in this action.

"3. That the facts stated in the pleadings in this action show, at the utmost, a cause of action for damages by the plaintiff against the defendant, but not any cause of action upon the bill of exchange sued upon in this action; and that the measure of damages sustained by the plaintiff by reason of his having given up the bill, would not necessarily be the amount of the bill now sued upon."

[CRESSWELL, J.—Yes it was. What becomes of the stamp? The bill could not be sued upon.] Be that as it may, the case is still an authority in favour of the defendant; as also is *Kelly v. Solari*. All the cases relied on for the plaintiff occurred before *Kelly v. Solari*; and they were all cases of bankers, who have a public duty cast upon them by reason of their occupation. See the authorities collected in *Marriot v. Hampton* (7 T. R. 269), in 2 Smith's Leading Cases, 336. This is a mere promise to pay the former bill. If the money had been actually paid, it might have been recovered back: *Milnes v. Duncan*, 6 B. & C. 671 (E. C. L. R. vol. 18), 9 D. & R. 731. As between these parties, this plea amounts to a plea of no consideration: *Southall v. Rigg*, 11 C. B. 481 (E. C. L. R. vol. 73). [JERVIS, C. J.—Do you say that the giving up the holder's claim against the drawer and endorsee was no consideration?] It does not appear that he was at all prejudiced. The replication admits that the plaintiff represented to the defendant that he was liable upon the bill, that the bill given up was not genuine, and that the substituted bill was given on the faith that the former instrument was a genuine one. The replication shows no estoppel: it is not alleged that the plaintiff was prejudiced by giving up the original bill, or that he *285] *could have sued any of the other parties on the bill. [JERVIS, C. J.—Could not the defendant have sued Mr. Villiers upon the bill when he got it? The plea clearly does not amount to a plea of no consideration.] He takes the bill after it is due. [JERVIS, C. J.—Subject to all its equities. WILLES, J., referred to *Serle v. Waterworth*, 4 M. & W. 9,† and *Nelson v. Serle* (the same case in error), 4 M. & W. 795.†] It does not appear that the representation (tacitly) made by the defendant was wilful, so as to induce the plaintiff to act upon it to his prejudice. In *Howard v. Hudson*, 2 E. & B. 1, 10 (E. C. L. R. vol. 75), Lord Campbell says: "I accede to the rule laid down in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 486, and in *Freeman v. Cooke*, 2 Exch. 654.† If a party *wilfully* makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to the representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show both that there was a *wilful intent* to make him act on the faith of the representation, *and that he did so act.*" The subject underwent much discussion in the subsequent case of *Foster, Public Officer of the Britannia Mutual Life Association, v. The Mentor Life Assurance Company*, 3 E. & B. 48 (E. C. L. R. vol. 77), where Lord Campbell, at p. 79, observes,—“The doctrine of *Pickard v. Sears* and *Freeman v. Cooke*, which we have lately had to consider in *Howard v. Hudson*, would have effectually estopped the Britannia Company from

denying that they had given the warranty, if they had stated that they had signed the declaration ; for, then they would have made a statement on which the Mentor Company *had acted, and thereby incurred [*286 a liability to their prejudice." *Smith v. Mercer* proceeded upon the peculiar position of the bankers ; and one of the judges, Chambre, J., dissented from the decision. Upon the whole, it is submitted, that the replication does not show that the plaintiff gave up any right of action against anybody on the bill, or any negligence or breach of duty on the part of the defendant ; and that if the representation of the defendant be relied on as an estoppel, the circumstances which constitute the estoppel should have been set forth.

Phipson, in reply.—The plea is in substance a plea of no consideration : and the replication shows that that there was consideration for the giving of the renewed bill. [ORESSWELL, J.—You are seeking to enforce your remedy upon the defendant's promise. You must show a consideration for it.] The giving up the original bill with the names of the other persons on it, was consideration enough. [JERVIS, C. J.—The plea states that the *only* consideration was the giving up the forged acceptance. Some members of the court think that the replication should be amended. WILLES, J.—All that is alleged in the replication is evidence which would come out on a traverse to the plea.] Upon the point of consideration it certainly would be so. But it is submitted the defendant is estopped from saying that there is no consideration. [CROWDER, J.—Should not that have been shown by the replication?] An estoppel may always be taken advantage of when it appears upon the record : *Lainson v. Tremere*, 1 Ad. & E. 792 (E. C. L. R. vol. 28), 8 N. & M. 608. [WILLES, J.—The replication does not allege that the giving up the piece of paper on which the first bill was written, was the consideration for the acceptance of the second bill. You had better exclude the difficulty, by *averring that the [*287 forged bill was given up, and that the second bill was given in consideration of the delivery up of the former.]

Phipson elected to amend.

The following amended replication was afterwards delivered :—

And for a second replication to the defendant's plea, the plaintiff said, that, when the said bill of exchange drawn by the said Francis Villiers, and endorsed by the said Edward Rawson Clark, and purporting to be accepted by the defendant, in the said plea mentioned, became due and payable according to the tenor and effect thereof, the plaintiff, then being the lawful holder thereof for value, and the same having been and being drawn payable to order, and endorsed in blank by the payee thereof, and by the said Edward Rawson Clark, respectively, caused the same to be presented to the defendant for payment thereof, but the defendant did not pay the same ; whereupon the plaintiff, then, and in due time in that behalf, gave due notice to the said Francis Villiers and Edward Rawson

Clark, respectively, of such presentment and dishonour of the last mentioned bill: That he, the plaintiff, had not at any of such times, or at the time when the last-mentioned bill was given up by the plaintiff to or for the defendant as thereafter mentioned, any notice, nor did he know or believe, nor had he reason to believe, that the signature of the defendant's name upon the last-mentioned bill purporting to be his acceptance of the same, was not the defendant's genuine signature and acceptance, or that the defendant was not liable thereon as the acceptor of the last-mentioned bill: That, after the said presentment of the last-mentioned bill for payment as aforesaid, and *288] was given up to or for the defendant as thereafter mentioned, and whilst the plaintiff was the lawful holder thereof, the defendant, at his request, and by the sufferance and permission of the plaintiff, inspected the last-mentioned bill, then having the supposed acceptance of the defendant thereon, and the defendant received and took the same into his hands for that purpose, and did not say or suggest that the said supposed acceptance was a forgery, or that his name had been written on the last-mentioned bill without his knowledge, consent, or authority, or that he was not liable thereon as the acceptor thereof; but complained to the plaintiff that the said Edward Rawson Clark had not renewed the last-mentioned bill before it became due, and then informed the plaintiff that he, the defendant, had before then given the said Edward Rawson Clark another acceptance and a check for 100*l.* for the purpose of renewing the same: That the said conduct and behaviour of the defendant on the occasion aforesaid, and his conduct next thereafter mentioned, respectively, confirmed the plaintiff in his, the plaintiff's, belief that the acceptance of the said bill in the replication first aforesaid was the genuine signature and acceptance of the defendant, and that he was liable thereon as the acceptor of the last-mentioned bill, and induced the plaintiff to act, and the plaintiff did accordingly and in consequence thereof act as thereafter alleged: That, after the lapse of eight days after the defendant had so inspected the last-mentioned bill, the defendant, by and through the said Edward Rawson Clark, his the defendant's agent in that behalf, *and in consideration of the delivery up to him of the said last-mentioned bill as thereafter mentioned*, delivered to the plaintiff the said bill in the declaration mentioned, so drawn, accepted, and endorsed as therein and herein alleged, and paid to the plaintiff the *289] sum of 60*l.*, and *the plaintiff thereupon, at the request of the defendant, by the said Edward Rawson Clark, his agent in that behalf as aforesaid, then delivered to the said Edward Rawson Clark, as and being such agent as aforesaid, who then, as such agent as aforesaid, took and received respectively for and on behalf of the defendant, the said bill of exchange in this replication first above mentioned: That the said bill of exchange so given up by the plaintiff to or for the defendant as aforesaid, had never been returned by the defendant, or otherwise

howsoever, to the plaintiff: And that the defendant did not give the plaintiff notice, nor did the plaintiff receive notice, nor did he know or believe, nor had he reason to believe, that the last-mentioned bill was not accepted by him the defendant, or by his authority, until thirty days had elapsed after the same had been so as aforesaid delivered to and received by the said Edward Rawson Clark, as such agent as aforesaid.

The defendant joined issue upon the second amended replication, and, for a second rejoinder, said that he did not discover that the signature of his name upon the said bill of exchange so given up by the plaintiff for the defendant as aforesaid was not his the defendant's signature, until the expiration of the said period of thirty days in the said second replication mentioned; and that, when he first discovered the same, he forthwith gave notice thereof to the plaintiff, and then offered to return to the plaintiff the last-mentioned bill of exchange, and then tendered the same to the plaintiff, but the plaintiff refused to receive the same; and that, from the time of his the defendant's first discovering that the said signature was not his the defendant's signature, hitherto, he, the defendant, had always been ready and willing to return to the plaintiff the last-mentioned bill of exchange, whereof the plaintiff had always during that period had notice: That, at the time when he offered to return the last-mentioned bill of exchange *to the plaintiff as [290 aforesaid, or tendered the same as aforesaid, and from thence hitherto, the plaintiff might and could have enforced payment of the last-mentioned bill against the said Francis Villiers and Edward Rawson Clark, or any other party to the said bill, and recovered from them the amount thereof, as fully and effectually as he the plaintiff could have enforced payment or recovered the amount thereof at the time when the plaintiff first gave up the last-mentioned bill for the defendant as aforesaid, or at any time between that period and the time when the defendant offered to return and tendered the last-mentioned bill of exchange to the plaintiff: And that the plaintiff did not lose, nor was he deprived of, any remedy upon the last-mentioned bill, nor was he, nor had he been, in any way prejudiced or injured by reason of his having given up the last-mentioned bill of exchange for the defendant as aforesaid, otherwise than as in the said replication and herein appears.

To this rejoinder the plaintiff demurred.

Phipson, for the plaintiff.—The amendment suggested by the court having been made, it now appears sufficiently upon the whole record that the original bill was presented and dishonoured, and notice thereof given to the drawer and endorser, and that the consideration for the giving of the second bill was the delivery up of the former one. [JERVIS, C. J.—The giving up of the first bill clearly was a good consideration. I think we should hear the other side.]

Macnamara, contra.—The plea discloses a complete failure of consideration, on the ground that the bill which was given up was not the

acceptance of the defendant, and that therefore the defendant had not that which he bargained for. In *Gurney v. Womersley*, 4 E. & B. 133 (E. C. L. R. vol. 82), which was an action for money received, *291] *with a plea of never indebted, the facts were these:—The plaintiffs and defendants were both money-dealers and bill-brokers in London. A. was a customer of the defendants. N. & Co. were a firm of high repute in London. A. brought to the defendants to discount an acceptance of N. & Co. The defendants took it to the plaintiffs for discount, but refused themselves to endorse or guaranty the bill. The plaintiffs agreed to take it at the ordinary rate of discount, expressly on the credit of N. & Co.'s name, and gave the defendant their check for the amount, and the defendants gave A. their own check for the amount at a higher rate of discount. After this, several other acceptances of N. & Co. were discounted in the same manner. All these were genuine, and were honoured. A. afterwards brought to the defendants what purported to be a bill drawn on N. & Co. for 3050*l.*, endorsed specially to A., and accepted by N. & Co. It was carried by the defendants to the plaintiffs, who agreed to take it. The defendants then procured A. to endorse it in blank, gave it to the plaintiffs, received their check for the proceeds, less discount at one rate, and gave their own check for the proceeds, less discount at a higher rate. It turned out that all the names on this bill, except A.'s own, were forgeries. A. was convicted of the forgery, and became bankrupt. The action was brought to recover the amount given by the plaintiffs for this bill. At the trial, it was proved, that, in London, all bill-brokers are also money-dealers, themselves discounting bills with their own money for their customers. Sometimes a bill-broker does not discount a bill himself, but finds a capitalist who will take the bill, without recourse to the bill-broker. In such cases, the customer is never introduced to the capitalist, but the capitalist gives his check to the bill-broker for the amount of the bill, less the discount agreed on between the bill-broker and capitalist, and *292] the bill-broker gives *his check to the customer for the amount of the bill, less the discount agreed on between the bill-broker and customer; which rates of discount are not the same. The judge (Lord Campbell) told the jury, that, on the undisputed facts, though there was no endorsement or guarantee, and therefore no warranty of the solvency of the parties to the bill, there was a total failure of consideration, and the plaintiffs were entitled to recover back the money paid for the bill from the party with whom the transaction was. And he left it to the jury to say whether the transaction was one between the plaintiffs and defendants, or one between the plaintiffs and A., through the defendants as agents merely. A verdict having been found for the plaintiffs,—upon a motion for a new trial, it was held,—first, that the verdict was justified by the evidence, and that, in such cases, the contract is between the capitalist and bill-broker, and not between the

capitalist and the bill-broker's customer,—secondly, that, though A.'s endorsement was genuine, and there was so far recourse on the bill, yet that the undisputed facts showed that the bill was taken as an acceptance of N. & Co., and that the genuineness of their acceptance was the essence of the description; and that, consequently, the direction that there was a total failure of consideration, was right: and leave to appeal under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 85, was refused, the court considering that the law was too well settled to justify an appeal. Lord Campbell there said: "I am of opinion, that, though the defendants, by not endorsing or guarantying the bill, preserved themselves from warranting the solvency of any of the parties, yet they did undertake that the instrument was what it purported to be. It is not disputed that in fact the discount of their bill by the plaintiffs was solely on the faith of its being an acceptance of P. & C. Van Notten, which it *was not*; and in consequence of its being so it was valueless. The possibility of recourse against the estate of Anderson, a convict and a bankrupt, did not prevent there being a total failure of consideration." That case is directly in point. Here, it is admitted on the record that the defendant was not liable upon the former bill, the giving up of which was the moving consideration for his giving the substituted bill now declared on. In *Wilkinson v. Johnson*, 3 B. & C. 428 (E. C. L. R. vol. 10), 5 D. & R. 408 (E. C. L. R. vol. 16), the bills having been paid through a mistake, though the endorsements had been struck out, the plaintiffs were held entitled to recover back the money because the bills were forgeries. [CRESWELL, J.—And because the other party had not lost any remedy.] Abbott, C. J., in giving judgment, says: "It is by no means a matter of course to call upon a person to pay a bill for the honour of an endorser; and such a call, therefore, imports on the part of the person making it that the name of a correspondent for whose honour the payment is asked is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him *in fact*; though no assertion may be made *in words*. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And, though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantity, yet, where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may by his own prior mistake have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, whilst the remedies of all the parties entitled to *remedy* are left entire, and no one is discharged by laches." And at the close of the judgment his Lordship says,—

"If, indeed, it shall hereafter appear that the defendants are put to any additional expense, by extra proof, or otherwise, on account of this improvident act of the plaintiffs, which is very unlikely, they may possibly maintain a special action upon the case to recover compensation, to the extent of the injury they sustain." So, in the case of the forged navy-bill, *Jones v. Ryde*, 5 Taunt. 488 (E. C. L. R. vol. 1), 1 Marsh. 157 (E. C. L. R. vol. 4), Gibbs, C. J., says: "The defendant has in the present case put off this instrument as a navy-bill of a certain description: it turns out not to be a navy-bill of that amount, and therefore the money must be recovered back." (a) In *Cocks v. Masterman*, 9 B. & C. 902 (E. C. L. R. vol. 17), 4 M. & R. 676, money paid on a forged bill was held not to be recoverable back, the ground of the decision being, that the holder of a bill is entitled to know, on the day on which the bill becomes due, whether it is honoured or dishonoured. That ground is met by an averment in the replication here. *Price v. Neal*, 3 Burr. 1354, 1 W. Blac. 390, and *Smith v. Mercer*, 6 Taunt. 76, 1 Marsh. 453, also proceeded upon the ground that all the laches was imputable to one side only. The doctrine in all those cases is materially affected by the decision of the Court of Exchequer in *Kelly v. Solari*, 9 M. & W. 54,† which case and those of *Milnes v. Duncan*, 6 B. & C. 671 (E. C. L. R. vol. 13), 9 D. & R. 731 (E. C. L. R. vol. 22), and *Bell v. Gardiner*, 4 M. & G. 11 (E. C. L. R. vol. 43), 4 Scott, N. R. 621, 1 Dowl. N. S. 683, are distinct authorities in favour of the defendant. Further, it nowhere appears upon this record that the plaintiff has sustained any prejudice by reason of the mistake. [CRESSWELL, J.—The law does not permit any inquiry as to that, in the case of *295] negotiable instruments: and it is highly *expedient that that should be so.] At the most, the plaintiff only shows a right to recover such damages as could arise from the original bill having remained in the defendant's hands for thirty days,—and that, not by an action upon the bill, but by a special action on the case, as suggested by Abbott, C. J., in *Wilkinson v. Johnson*.

JERVIS, C. J.—I am of opinion that our judgment in this case must be for the plaintiff. As a general rule, the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity; and, when the bill is presented, if the acceptor pays it, the money cannot be recovered back, if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery. Can it make any difference that, instead of paying money for the bill, he takes the bill, examines it, and gives another acceptance in lieu of it? The replication in this case having been amended, the facts which appear upon the whole record are these:—A bill of exchange was drawn by Villiers upon the defendant, and accepted by the defendant for the accommodation of Villiers,

(a) The bill as originally issued was for 883*l.* 16*s.* 3*d.* The forgery consisted in altering the amount to 1883*l.* 16*s.* 3*d.*

and endorsed by Villiers to Clark, and by Clark to the plaintiff; that bill was presented and dishonoured, and notice of the dishonour duly given to Villiers and to Clark, in order to preserve the holder's remedy over against them; the bill was subsequently offered to the defendant, who, having had an opportunity of inspecting it, kept it, and gave the plaintiff a renewed bill at three months; and a month afterwards he discovered that the acceptance was not his signature, and that he was not liable, and he proposed to return the bill,—having delayed the plaintiff of his remedy against the parties liable thereon for thirty days. Under these circumstances, I apprehend the *defendant could not be allowed to say that the acceptance was not his hand- [*296 writing. I think there is sufficient upon the whole record to show a consideration for the acceptance of the bill declared on, viz., a loss to the plaintiff of his remedy on the bill against Villiers and Clark. I therefore think the plaintiff is entitled to judgment.

CRESSWELL, J.—I am clearly of the same opinion. A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and it afterwards turned out to be a forgery; he cannot afterwards be permitted to say that he paid the money under a mistake. I apprehend the same result must follow if in lieu of money a fresh acceptance is given; and particularly where the party has retained the instrument in his hands so long as the defendant has done in this case. From the circumstances disclosed on this record, the law will infer a loss to the plaintiff. It is clear, therefore, that the defence in question cannot be allowed to be set up.

WILLIAMS, J., not having heard the whole of the argument, declined to give any opinion.

WILLES, J.—I entirely concur in the opinions expressed by my Lord and my Brother Cresswell. Judgment for the plaintiff.

*Ex parte GEORGE HENRY DAVIDSON. *May 8.* [*297

The court will not exercise its power under the 14th section of the Copyright Act, 5 & 6 Vict. c. 45, to expunge an entry of proprietorship of copyright in the registry book at Stationers' Hall, unless it be clearly and unequivocally shown that it is false,—or vary it, unless satisfied by affidavit that in so doing they would make a true entry,—repudiating the power exercised by the Court of Queen's Bench in *Ex parte Davidson*, 2 Ellis & B. 577 (E. C. L. R. vol. 75).

The author of a song being in America, and wishing to secure to himself the copyright in England and in America, by a simultaneous publication in both countries, sent instructions to his publishers here to publish it in London on a given day. The publishers did so, and caused an entry to be made in the registry book at Stationers' Hall, in which they described themselves as the proprietors of the copyright. A. pirated the song in this country, and the author afterwards procured a judge's order to vary the entry by substituting his name as the proprietor, and obtained an injunction, and brought an action against A. for the infringement of his right.

Quere whether, under these circumstances, A. was a "party aggrieved" within the 14th section of the Copyright Act, so as to be entitled to ask the court or a judge to expunge or vary the amended entry?

BOVILL, on a former day in this term, obtained a rule on behalf of George Henry Davidson, calling upon Samuel Lover to show cause why the entry of the 7th of December, 1846, of a certain book called "The Low Back'd Car," in the registry-book of copyrights and assignments kept at the Hall of the Stationers' Company, should not be expunged entirely, or so far as it alleged Samuel Lover to be proprietor of the copyright therein; or why such entry should not be amended or varied as the court should direct; or why the said Samuel Lover should not be precluded from relying upon such entry as evidence of his proprietorship in the said copyright on the trial of a certain action pending in this court between the said Samuel Lover and the said G. H. Davidson; or why an issue should not be directed to try the copyright in such book.

The affidavit upon which the motion was founded, stated, that the applicant had for many years past been in the habit of purchasing and publishing copyright musical works, and English editions of foreign musical publications, and, amongst others, had reprinted an American musical publication purporting to be written and composed by one Samuel Lover, entitled "The Low Back'd Car," and which he reprinted *298] from a copy *transmitted to him for that purpose by his agent in New York, and which was accompanied by a certified copy of its registry as an American copyright: That, in the year 1846, the said Samuel Lover was resident in the United States of America, having arrived there on or about the 1st of September in that year; and that he then wrote or produced the said song, adapted it to an old Irish melody known as "The Jolly Ploughman," and sold the copyright therein to Messrs. Firth & Hall, music publishers resident at New York aforesaid, by whom the same was published (as appeared by the date printed on the title-page thereof) on the 4th of December, 1846, and by whom the copyright was entered in the proper office in America, as belonging to them, on the 7th of December, 1846, as appeared by a certified copy of such entry annexed to the affidavit.(a) That the American copyright acts require a statement of the facts of copyright such as referred to in that certificate, to be printed on every copyright publication; and that any false statement subjects the parties making it to severe penalties: That the entertainment of Irish Evenings alluded to was first given on the 28th of September, 1846; and that the date

(a) "Southern District of New York, S. S.

"Be it remembered, that, on the 7th day of December, anno Domini 1846, Firth & Hall, &c., of said district, have deposited in this office the title of a musical composition the title of which is in the following words, to wit, 'The Low Back'd Car,' a characteristic Irish song, as given by the author in his 'Irish Evenings,' written and composed by Samuel Lover, the right whereof they claim as proprietors, in conformity with an Act of Congress intitled 'An act to amend the several acts respecting copyrights.'

"J. W. METCALF, clerk of the Southern district of New York.

"N. B. A copy of the above work must be deposited in this office within three months from the publication thereof, to secure the copyright.

"Work deposited December 22, 1846."

of the 4th of December, 1846, printed on the title-page, was that on which the said Samuel Lover sold *and parted with his copyright in the said song: That, by the International Copyright Act, 1 & [*299 2 Viet. c. 59, s. 14, the author of any book to be after the passing of that act first published out of Her Majesty's dominions, or his assigns, shall have no copyright therein within Her Majesty's dominions, otherwise than such (if any) as he may become entitled to under such act; and that that act has never been brought into operation between Great Britain and the United States: That, notwithstanding the said Samuel Lover's residence in the United States, and his sale and assignment to the American publishers, the said song was, on the same 7th of December, 1846, entered in the books of the Stationers' Company as the copyright of Messrs. Duff & Hodgson, of 65 Oxford Street, London, and which remained so entered until the 15th of March, 1855, when such entry was altered by an order of Jervis, C. J., by substituting the said Samuel Lover's name for those of Duff & Hodgson as the proprietor of the copyright: That such alteration was made on the ex parte application of the said Samuel Lover, and without notice to Davidson, although he was at that time printing and publishing the said song; and the deponent believed such alteration was made for the purpose of enabling the said Samuel Lover to adopt proceedings against him: That, had he been served with notice of any application to make such alteration in the entry, he should have opposed the same: That, shortly after such alteration of the said entry, viz., on the 25th of March, 1855, the said Samuel Lover filed a bill against the deponent in Chancery, and had obtained an injunction to restrain the deponent from printing or publishing the said "Low Backed Car," subject to his commencing an action at law to try his copyright therein: That such action had been brought, and the deponent had pleaded and also given the notice of objections prescribed by the statute, *and had also obtained and [*300 forwarded to America a commission to examine witnesses in support of his defence to the said action; but that he was advised, and believed, that, unless the said entry were struck out or amended, or the said Samuel Lover restricted from setting up the same, he would be unjustly prejudiced in his defence to the said action.

Annexed to the affidavit were a copy of the entry in the registry book at Stationers' Hall as it now stands, and a copy of the affidavit made by Lover in support of his application for the injunction. In the former, in the column headed "Time of making the entry," the date appeared "December 7, 1846," and in the column headed "Name and place of abode of the proprietor of the copyright," the entry originally stood thus,—"Duff & Hodgson, 65 Oxford Street," and the amendment or alteration consisted in running a pen through the names "Duff & Hodgson," and writing above them the name "Samuel Lover," with the following memorandum written beneath,—“The alteration in the name of the pro-

prietor of the copyright was made by an order of Chief Justice Jervis, dated March 15, 1855."

Bovill cited *Jefferys v. Boosey*, 4 House of Lords Cases, 815. [CRESSWELL, J., referred to *Chappell v. Purday*, 12 M. & W. 303;† and WILLES, J., referred to *Ex parte Davidson*, 2 E. & B. 577 (E. C. L. R. vol. 75.)]

Ogle now showed cause, upon an affidavit of Lover, in which he stated that he was and always had been a British subject resident in the United Kingdom; that he paid a temporary visit to New York in the year 1846, and travelled in America for two years, and then returned to England, and that, save as aforesaid, he was never in America, and never resided there; and that he wrote the song in question in the year 1845, and that it was sung in public in that year and in the year 1846, *301] *before he went to New York, at Liverpool, Dublin, Limerick, Waterford, and Cork: That, whilst he was so in America, he determined on publishing the said song in England and America simultaneously, and made arrangements with Messrs. Firth & Hall, of New York, music publishers (to whom he granted the exclusive right of publishing the said song in America), and with Messrs. Duff & Hodgson, of Oxford Street, his own publishers, that the song should be for the first time published in both countries on the 7th of December, 1846: That the song was registered both in the District Court of the United States for the Southern district of New York, and also in the book of registry and of copyrights and assignments kept at Stationers' Hall, London, on the same 7th of December, 1846; and he concluded that the said entry at Stationers' Hall was correctly made, until he discovered the error in such entry as hereinafter mentioned: That the song was published and sold by Duff & Hodgson in England on the 7th of December, 1846, and had ever since continued to be published and sold by them: That the said song was not published in America until *after* the said 7th of December, 1846 [copies of the first and tenth editions of the song as published by Firth & Hall of New York, were exhibited,—the former being dated the 4th, the latter the 7th of December, 1846,—the former by mistake, as it was alleged, of the engraver]: That the entry in the book kept at Stationers' Hall was erroneously made by Duff & Hodgson, so far as such entry set forth the name of the proprietor of the said copyright, but that the deponent did not know of the error until the beginning of the year 1855, when, feeling aggrieved by such entry, he applied to Jervis, C. J., at Chambers, for an order to amend it, and in support of such application an affidavit of the deponent and Messrs. *302] Duff & Hodgson sworn on the 15th of *March, 1855, was read, and the order for the amendment granted: That the alteration directed by the said order was made accordingly on the day of its date; and that, notwithstanding such erroneous entry, the deponent always had been, and still was, the absolute and exclusive proprietor of the copyright so entered at Stationers' Hall as aforesaid.

There was also an affidavit of Mr. Lover's attorney, which stated that the action referred to in Davidson's affidavit was commenced on the 28th of April, 1855; that the declaration therein was delivered on the 18th of May; that the defendant pleaded thereto on the 29th of October; that issue was joined on the 10th of November last, and notice of trial given for the sittings after last Michaelmas Term; that, on the application of the defendant, an order was made by Cresswell, J., on the 15th of November last, for a commission to examine witnesses in New York, such commission to be returned on or before the 1st of February, 1856; that the commission was sent to New York on the 1st of January; that, on the applications of the defendant, the time for the return of the commission had been from time to time enlarged, and by the last order, which was made by Crompton, J., on the 2d of April last, the time for the return of the commission was further enlarged until the 1st of June next; that, the commission having been returned on the 15th of April, the deponent on the 29th gave a fresh notice of trial for the sittings after Easter Term, whereupon the defendant applied for a further postponement of the trial, founding his application upon an affidavit that certain original documents had been sent out by him to America with the commission, and had not been returned, and that he could not safely proceed to trial without them, and thereupon the trial was ordered to be postponed until after the first sitting in Trinity Term; that, although issue was so joined, *and notice of trial was so given on the 10th of November last, and the commission for the examination of [*303 witnesses was sent out by the defendant on the 1st of January last, no application was made by or on behalf of Davidson relative to the entry in the books of the Stationers' Company of the copyright of "The Low Backed Car," until the 29th of March last, when a summons was taken out, which resulted in the present application.

The 11th section of the Copyright Amendment Act, 5 & 6 Vict. c. 45, requires a book of registry to be kept at Stationers' Hall, wherein may be registered "the proprietorship in the copyright of books, and assignments thereof, and licenses affecting such copyright," and enacts that certified copies of any entry in such book "shall be received in evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence." By s. 12, the making a false entry in the book of registry is declared to be a misdemeanour. The 13th section enables the proprietor of copyright in any book theretofore published, or in any book thereafter to be published, to make entry in the registry book of "the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the

schedule to the act annexed," upon payment of a certain fee. And s. 14 enacts, "that, if any person shall deem himself aggrieved by any entry made under colour of this act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, *304] or to apply by summons to any judge of either of such courts in *vacation, for an order that such entry may be expunged or varied; and that, upon any such application by motion or summons to either of the said courts, or to a judge, as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just: and the officer appointed by the Stationers' Company for the purposes of this act, shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."

There are two answers to this rule,—first, that the applicant is not a "party aggrieved" within the meaning of the 14th section, and therefore not entitled to avail himself of its provisions,—secondly, that, under the circumstances, seeing the great delay which has taken place here, and the expense the applicant has wantonly occasioned, the court will not exercise its discretion in his favour.

1. The facts, as they appear upon the affidavits before the court, are shortly these:—Mr. Lover composed the song in question, "The Low Backed Car," in the year 1845. In the following year he went to America; and, in December, 1846, being anxious to preserve his copyright therein in America as well as in England, he made arrangements to have it registered here and at New York on the same day; and accordingly it was simultaneously registered by Firth & Hall in New York, and by Duff & Hodgson in London, on the 7th of December, 1846. Upon his return to England, having discovered that Duff & Hodgson, who were only Lover's agents, had caused the song to be registered in their own names as proprietors of the copyright, Mr. Lover, in March, 1855, obtained a judge's order to amend the entry in the *305] registry book by inserting his own name in lieu of those of Duff & Hodgson,—the entry remaining in all *other respects the same as before. He then applied for an injunction to restrain Mr. Davidson from pirating the song, which was granted, subject to the condition that he should bring an action in this court to establish his right. The injunction was granted on the 25th of March, 1855. At this time Davidson was aware of the alteration which had been made in the entry in the registry book. The action having been brought, issue was joined in November last, and notice of trial given for the sittings after last Michaelmas Term. The defendant (Davidson) thereupon obtained a commission for the examination of witnesses at New York, which was ultimately returned on the 15th of April: and, after various applica-

tions at Chambers all tending to delay, Davidson now for the first time, having had full information of the state of the entry at least since the 25th of March, 1855, comes to the court to seek to have it varied or expunged. Davidson clearly is not a "party aggrieved." The original entry was made in 1846. He could not be aggrieved by that. But it will be said that he is aggrieved by the alteration made in that entry in March, 1855. He, however, had no interest in the matter then: there were no proceedings pending against him at that time. [JERVIS, C. J.—Davidson published the song in question before there was any litigation. Assume that he first published in 1854. At that time Lover did not appear to be the proprietor of the copyright. Davidson had then acquired *some* right by his publication: he had a good title as against Duff & Hodgson, who never were the proprietors. Is he not prejudiced, or "aggrieved," by having another person put on the register as the proprietor?] This action was not commenced until six months after the alteration was made. The case of *Chappell v. Purday*, 12 M. & W. 303,† therefore, does not apply. [CRESSWELL, J.—But the publication in respect of which the action is brought *took place long [*306 before. The entry in its then state could not have been used against Mr. Davidson at that time. Are you to be allowed to make that sort of *prima facie* evidence after the accruing of the cause of action?] That would, it is submitted, be doing no injustice: Davidson does not deny Lover's right; and he makes no claim of right in himself. [CRESSWELL, J.—If the 24th section,—which enacts "that no proprietor of copyright in any book which shall be first published after the passing of the act, shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book pursuant to the act,"—applies, Davidson will not be prejudiced by the alteration, the date of it appearing. JERVIS, C. J.—Does the alteration relate back to the date of the original entry?] The alteration was made on the 15th of March, 1855. All the plaintiff's cause of action accrued before that date. If the alteration is not retrospective, Mr. Davidson is not hurt by the entry: and, if it has a retrospective operation, that will be matter for consideration hereafter.

2. Assuming that Davidson is a "party aggrieved" by this alteration in the registry book, the application is clearly to the discretion of the court. Regard being had to the conduct of the party, and seeing that the objection is only taken after such repeated delays, it is submitted that the application is not one entitled to favour. The cases *Chappell v. Purday*, 12 M. & W. 303,† and *Ex parte Davidson*, 2 Ellis & B. 577 (E. C. L. R. vol. 75), show that the court will not under any circumstances strike out the entry; and that the utmost they will do, is, to preclude the plaintiff from relying upon it as evidence at the trial.

*307] **Quain* (with whom was *Bovill*), in support of the rule.—The object of this application is, that the plaintiff should not be permitted to rest upon the *primâ facie* evidence afforded by the entry in the book of registry, and so cast upon the defendant the whole burthen of showing the date of the original publication of the song in question in America. The real question between the parties, is, whether the first publication took place here or abroad. (a) Mr. Davidson swears that he had a copy of the song sent to him from New York bearing the date of December 4, 1846,—the American copyright acts requiring the date of entry to appear on the title-page; and that, finding the date of registry here to be the 7th, he published the song here, as he would have had an undoubted right to do: and it is not until the year 1855, that Mr. Lover attempts to molest him, or seeks to alter the entry. [CRESSWELL, J.—The entry in the District Court of New York appears to have been made on the 7th of December; and you do not even state your belief that it was published in America before that day.] Justice will be attained by adopting the course which the Court of Queen's Bench adopted in *Ex parte Davidson*, 2 Ellis & B. 577 (E. C. L. R. vol. 75). There, Cocks brought an action against Davidson for publishing three pieces of music alleged to be the copyright of Cocks. Before the action, three entries had been made in the registry at Stationers' Hall, kept under the 5 & 6 Vict. c. 45, s. 11. These entries as they stood would afford *primâ facie* evidence of Cocks's copyright in the three pieces. Davidson obtained a rule nisi to expunge or vary those entries. It was obtained on an affidavit by which it appeared that Davidson claimed no copyright in the airs himself, but that his case was that they were old pieces, and that the persons who on the entries pro-

*308] fessed to be the authors were not really the authors; *and the affidavit deposed to information and belief as to facts, which, if true, proved that the pieces were older than the supposed authors. The counsel for Cocks refused to consent not to use these entries on the trial. The court declined to expunge the entries, but made an order, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which Cocks should be plaintiff, and on the trial of which the entries should not be used; and that, in the mean time, proceedings in the action should be stayed. The court may pronounce the same rule upon this occasion. [JERVIS, C. J.—We cannot do so without Mr. *Ogle's* consent.] The Court of Queen's Bench thought themselves justified in doing what was there done, *proprio vigore*, and without consent. If not, the entry may be wholly expunged, on the ground that it is false: the melody, which is confessedly old, is claimed, as well as the words of the song. Then, the entry, so far as regards the address of the supposed proprietor of the copyright, is not in accordance with the statute, "65, Oxford Street," not being, and

(a) See 1 & 2 Vict. c. 59, and 7 & 8 Vict. c. 12.

never having been, the place of abode of Mr. Lover. [JERVIS, C. J.—The statute authorizes us to expunge or to vary the entry. If this objection was of the least importance, we should at once order the entry to be amended.] The court would hardly think it right to make an amendment to prejudice the rights of a third party.

JERVIS, C. J.—I am of opinion that this rule ought to be discharged. If it were necessary to decide the point, I am inclined to think that the applicant is in the position of a person who has sustained a grief or prejudice which would entitle him to come to the court to call in question that which has been done with respect to this entry. But we are limited to the powers conferred upon us by the statute, viz. to expunge, or vary, *or to confirm the entry. Why are we to expunge it? Mr. [*309 Quain says we ought to expunge the entry because it is untrue. But, it must be observed, that, if we expunge it, it cannot be restored; and therefore it is not too much to require that the party who calls upon us to do that should satisfy us on oath that the entry is a false one. This he has not done. He merely says that the song as published in America bore on its title-page the date of December 4th, 1846, and that “the American copyright acts require a statement of the facts of copyright such as above referred to, to be printed on every copyright publication, and that any false statement subjects the parties making it to severe penalties.” He nowhere swears that the American copyright law requires the date on the copyright work to correspond with the day of its first publication. Mr. Lover, on the other hand, swears positively that the publication in America did not take place until the 7th of December. Then it is said that the entry in the registry book, as it now stands, contains an untrue description of the place of abode of the proprietor of the copyright. I think that is unimportant; and, further, that, if it were of any importance, we might order it to be amended now. Then Mr. Quain suggests, that, if we decline to accede to this application, we should at all events not determine the matter upon the affidavits which are before us, but should adopt the course which was adopted by the Court of Queen’s Bench in *Ex parte Davidson*, 2 Ellis & B. 577 (E. C. L. R. vol. 75), by ordering, *proprio vigore*, and without consent, that the rule be enlarged until the trial of an issue to ascertain the right, without using the entry in question as evidence. But, whatever vigour the Court of Queen’s Bench may possess, I must confess that I do not feel vigorous enough to follow that course. By the statute, the entry in the registry book is made *primâ facie* evidence of proprietorship, and no more. *When the plaintiff comes to launch his case at *Nisi Prius*, [*810 if he rests it upon that, the defendant may possibly not be able to displace it. Indeed, Mr. Quain admits that he cannot; and yet, in the face of that admission, he calls upon us to expunge or vary the entry. I think he has failed to make out a case for our interference, and that the rule must be discharged, with costs.

CRESSWELL, J.—I am entirely of the same opinion. The Copyright Act of 5 & 6 Vict. c. 45, authorizes us to expunge or vary or confirm any entry made in the registry book. Mr. *Quain* does not ask us to confirm the entry in question: he asks us to vary it, but does not suggest how. Then he asks that it may be expunged. That we clearly cannot do: it is, in effect, asking us to put an end to the action, because, in the absence of an entry, the action must fail. The affidavits upon which we are asked to do this are extremely doubtful. The inference I should be inclined to draw from them, is, that the publication here and in America was intended to take place on the same day. Whether it did or did not, I think we ought not to expunge the entry. If it be false, the defendant has a safer remedy.

CROWDER, J.—I also am of opinion that we ought not to interfere in this case. Whether or not Mr. Davidson is a “party aggrieved” within the meaning of the statute,—as to which I entertain some doubt,—still the power of the court is by s. 14 limited to the cases there pointed out. We can only expunge or vary or confirm the entry: I think we have no power to do that which was done by the Court of Queen’s Bench in *Ex parte Davidson*, 2 Ellis & B. 577 (E. C. L. R. vol. 75). To expunge the entry here, is out of the question: and, how can we exercise the power of varying it, unless we are satisfied that in so doing we should *311] be making a true entry? Here, there *is no evidence before us, that, by altering the date of this entry, we should make the entry true. There is no evidence before us that “The Low Backed Car” was published in America before the 7th of December, 1846. On the contrary, Mr. Lover’s affidavit states positively that it was not. It is enough, however, if the matter is left in doubt.

WILLES, J.—I am of the same opinion. The legislature, by the 11th section of the Copyright Act, 5 & 6 Vict. c. 45, intended to give the proprietor of copyright a right to register it at Stationers’ Hall, and to use that entry as *prima facie* evidence of proprietorship. For the purpose of preventing any abuse of the right so given, they proceed in s. 14 to give power to any person who might be aggrieved by such entry, to apply to the court or a judge to expunge or to vary it. To induce the court to exercise its jurisdiction under s. 14, it must be satisfied that there is something unfair in the entry, by reason of misconduct on the part of the person who made it, or of some right of the applicant which has been injuriously affected thereby. In the present case, no such unfairness is suggested: it is not denied that Lover was the author at least of the words of the song in question. It is only suggested that he is not the proprietor of the copyright, because, contrary to his manifest wish and intention, the thing was published in America three days before it was published in this country. It has not been made out to my satisfaction, upon the affidavits which are before us, that there was a prior publication in New York: and, unless that was made out *clearly*,

I should not feel disposed to deprive the party who is the undoubted author, of the advantage which the entry gives him. Then, has any right of the applicant been interfered with or injuriously affected? I do not see that it has. This is not the case of a *contested title: [*312 the applicant does not suppose himself to have been the original author of the composition in question: he claims to publish a thing to which he has no right whatever, merely because the person who is the author, and who therefore ought to have the sole right of publishing it here, has happened (it may be) to publish it in America a little too early, or has made an unintentional mistake in the date on the title-page, or has incorrectly described his place of abode in the entry in the book at Stationers' Hall. I do not think it is a case in which we ought to interfere.

Rule discharged, with costs.

RUMLEY v. IRWIN. April 17.

See the syllabus to Ashcroft v. Foulkes, ante, p. 261.

IN this case the plaintiff sought to recover 375*l.* in an action for goods sold and delivered, in which there was a plea of set-off. By an order of Nisi Prius, the cause was referred, with the same power to the arbitrator to certify as a judge would have had. The arbitrator, having heard the case, found a balance due to the plaintiff of 1*l.* 5*s.*, for which sum he gave his award. Under these circumstances, the plaintiff, finding that he was deprived of costs by the 13 & 14 Vict. c. 61, s. 11, both parties being resident within the jurisdiction of a county court, applied to Willes, J., at Chambers, for, and obtained, an order under the 15 & 16 Vict. c. 54, s. 4.(a)

Knowles now moved for a rule to show cause why that *order [*318 should not be rescinded. He submitted, on the authority of *Ashcroft v. Foulkes*, ante, p. 261, that the plaintiff's right to costs depended upon the amount *recovered*, by whatever means his claim might be reduced.

JERVIS, C. J.—That is not the effect of the decision in *Ashcroft v. Foulkes*. The plaintiff is not bound to take the set-off for granted. The master, when the parties come before him, is guided by the amount of the verdict. If that is less than 20*l.*, and there is no certificate, the plaintiff has no costs. But still it is discretionary with the court or a judge to make an order under the 15 & 16 Vict. c. 54, s. 4, where the sum sought to be recovered originally exceeded 50*l.*, and has been reduced by a set-off below 20*l.*

Knowles then asked for time to apply to the arbitrator to certify under the 43 Eliz. c. 6, to deprive the plaintiff of costs.

JERVIS, C. J.—The defendant should have asked for it at the time.

Rule refused.

(a) Which see, ante, p. 261.

*814]

*LITT v. MARTINDALE. April 18.

A. employed B., a broker at Liverpool, to purchase a security for him, for which purpose he remitted him a letter of credit for 2010*l.* on a bank there, payable to B. or order. C., who had had dealings with B., in the course of which the latter had become indebted to him in 1940*l.*, under pretence of borrowing the money for a few days, and knowing that it was A.'s money, induced B. to part with it, and then insisted upon applying it in discharge of B.'s debt to him:—Held, that A. might recover the amount from C. in an action for money had and received.

THIS was an action for money had and received. The only plea was, never indebted.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—The plaintiff, who resided in London, employed one Gladdow, a broker at Liverpool, to purchase for him a Hartlepool bond for 2000*l.*, to be ready for transfer on a given day. About a week before that day, the plaintiff forwarded to Gladdow a letter of credit from a bank in London on a Liverpool bank, to credit Gladdow or order with the sum of 2010*l.*, being the price of the bond, and Gladdow's commission. The defendant, a merchant at Liverpool, had had dealings with Gladdow, upon the result of which Gladdow became indebted to him in the sum of 1940*l.* Having learned that Gladdow was about to receive, or had received, a large sum of money, the defendant called upon him, and, representing himself to be under a temporary pressure, asked Gladdow to lend him 2000*l.*; whereupon Gladdow told him he had no money at his command but the 2010*l.* the letter of credit for which he had just received. Being much importuned by the plaintiff, Gladdow endorsed over the letter of credit to him; and they went together to the banking-house, Gladdow getting the letter of credit cashed, and handing the proceeds to the defendant, who returned him 10*l.*, retaining the 2000*l.* A few days afterwards, Gladdow called upon the defendant to return him the 2000*l.*, instead of which the defendant handed him a receipt for *315] 1940*l.*, and 60*l.* in cash. These facts becoming known *to the plaintiff, he brought this action for money had and received.

On the part of the defendant it was submitted, that, under the circumstances, money had and received would not lie.

The Lord Chief Justice overruled the objection, and directed the jury to find for the plaintiff for the sum claimed; reserving leave to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover.

Hugh Hill (with whom was *Quain*) now moved accordingly.—Under the circumstances disclosed by the evidence in this case, money had and received will not lie. This is a species of action which is founded on privity of contract. [CRESSWELL, J.—Is that so? Suppose the defendant has received the plaintiff's money without having any right to keep it?] Is there any adoption of the agency of the party handing over

the money? [CRESSWELL, J.—The plaintiff has money in the hands of a banker: the defendant goes to the agent, and says, "Let me have Litt's money, and I will return it in time." May he not be responsible for not returning it?] That would be a contract of loan: the principal would be adopting the act of the party lending the money. [CROWDER, J.—It cannot be said that Gladdow was the plaintiff's agent to lend this money.] J., an attorney, who was accustomed to receive dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office, who, in his master's absence, received money on account of the above dues (which he was authorized to do), and gave a receipt signed "B., for Mr. J." B. afterwards refused to pay the money over to the plaintiff, who thereupon brought an action for money had and received against B.: but the court held that the action would not lie; for, that B. received the *money as the agent or the servant of J., and must [*316 have paid it over to him if he had returned; and there being no privity of contract between B. and the plaintiff, the privity of contract being between B. and J., and between J. and the plaintiff: *Stephens v. Badcock*, 3 B. & Ad. 354 (E. C. L. R. vol. 23). The court distinguished that case from a case of *Stead v. Thornton*, there cited (p. 357, n.), where a party was holden to have received money belonging to a bankrupt's estate, on behalf of the general body of creditors, and not for an assignee who had become lunatic; for, there, the defendant could not have any authority to receive it for the lunatic assignee. The cases of *Sims v. Brittain*, 4 B. & Ad. 375 (E. C. L. R. vol. 24), and *Sims v. Bond*, 5 B. & Ad. 389 (E. C. L. R. vol. 27), proceeded upon the same principle,—impugning Lord Mansfield's wild doctrine, that the action for money had and received is a bill in equity.(a) In *Baron v. Husband*, 4 B. & Ad. 611 (E. C. L. R. vol. 24), the solicitor to the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning *creditor up to the time of the [*317 choice of assignees. The solicitor offered to pay the money, on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not assent: and it was held, that the latter could not maintain money had and received thereupon against the solicitor, though, after the above offer and refusal, he had authorized

(a) See *Moses v. Macferlan*, 2 Burr. 1005, 1012, where Lord Mansfield says,—“This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex æquo et bono* the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because, in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or *for money got through imposition* (expressed or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money.*”

the solicitor to pay over part of the money in discharge of commissioners' fees. Parke, J., in the course of the argument, said: "I doubt whether money had and received be maintainable here, because there is no privity between the plaintiff and defendant. The proof is, that the defendant offered to pay the plaintiff the amount of the check, on a condition which the latter refused to comply with. It does not appear that there was any previous agreement between them, that the defendant should receive the money from the assignees for the plaintiff's use. If I give a sum of money to my servant to pay a tradesman, the latter cannot maintain an action for money had and received against the servant." And, in giving judgment, Lord Denman said: "The defendant received the money as the agent of the assignees, and not of the plaintiff: he held it subject to their control and directions, and would continue to be accountable to them until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in *Williams v. Everett*, 14 East, 582, *Wharton v. Walker*, 4 B. & C. 163 (E. C. L. R. vol. 10), 6 D. & R. 288 (E. C. L. R. vol. 16), *Scott v. Porcher*, 8 Meriv. 652, *Wedlake v. Hurley*, 1 Cr. & J. 88,† and has been acted upon in many other cases." Here, any sum of 2000*l.* would have satisfied Gladdow's contract with the plaintiff; it was not necessary that the specific money should be applied in the purchase of the bond. Gladdow *318] has (it may be improperly) lent the *defendant 2000*l.* For this loan, the defendant is responsible to Gladdow, and to no one else. To entitle the plaintiff to maintain this action, there must be some privity of contract between him and the defendant: (a) the mere fact that the money belonged to the plaintiff is not sufficient, if the defendant is accountable for it to another: *Bluck v. Siddaway*, 15 Law Journ. Q. B. 359; *Cobb v. Becke*, 6 Q. B. 980 (E. C. L. R. vol. 51). [*JERVIS*, C. J. —If it had been put to them, the jury would unquestionably have found that Martindale, when he obtained the 2000*l.* from Gladdow, never intended to repay it. It was quite evident that he meant to pay his own debt with it.] No doubt he did.

JERVIS, C. J. —I think there should be no rule in this case. In truth this never was a loan from Gladdow to the defendant. It was a false pretence. The defendant watched the bank, and got information from a clerk, and then induced Gladdow to part with the plaintiff's money under the semblance of a loan, meaning all the while to set it off against his own debt. I think the action may well lie: it would be a monstrous thing if there were any technical difficulty in the way of the plaintiff's recovering the money back.

CROWDER, J. —I am of the same opinion. It was a gross fraud from the beginning.

The rest of the court concurring,

Rule refused.

(a) See Broom's Commentaries on the Common Law, 326, 327.

***WILKINSON v. GRANT. May 5.**

[*819]

The proposed mortgagee's solicitor has no claim for his charges against the proposed mortgagor, where the negotiation for the mortgage goes off through the default of the latter: he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expense.

THIS was an action for work and labour as an attorney, and for money paid. Plea, never indebted.

At the trial before Williams, J., at the first sitting in Middlesex in this term, it appeared that the claim arose out of a proposed mortgage transaction, the defendant being the proposed mortgagor, and the plaintiff the solicitor for the proposed mortgagee. It was admitted that the negotiation went off by the default of the defendant. The defence was, not that the defendant was not the party ultimately liable, but that, if liable at all for the costs of the abortive negotiation, he was liable to the intended mortgagee, and not to the solicitor.

Witnesses were called on both sides to prove the usage. Those called on the part of the plaintiff said that the invariable practice was, for the mortgagor's solicitor to pay the mortgagee's solicitor's charges, where the transaction goes off through the default of the mortgagor. The defendant's witnesses stated that they considered the proposed mortgagee was the party primarily liable in such a case; but they admitted that they never knew an instance in which the proposed mortgagee had been called upon to pay.

The learned judge told the jury, that, where a mortgage transaction was completed, the usual course was that the charges of the mortgagee's solicitor were paid out of the money advanced: but he did not state (nor was he asked to do so) what happened where the transaction went off, as it had done in this case.

A verdict having been found for the plaintiff,

Needham now moved for a new trial, on the grounds of misdirection, and that the verdict was against *evidence.(a) He submitted that the plaintiff's witnesses sufficiently established an invariable usage [*820] that the mortgagee's solicitor's costs should be paid by the mortgagor, on the negotiation going off through the default of the latter; and that, independently of usage, there was evidence of an express contract to that effect. The alleged misdirection consisted in the learned judge's not distinctly laying down the law to the jury on the subject of the mortgagee's costs, and also in his leaving to the jury the effect of certain correspondence between the parties, the construction of which it was said was for the judge. [CRESSWELL, J.—Was there an express contract in writing? or was a contract to be implied from a series of letters?] The contract was to be gathered from the correspondence. [CRESSWELL, J.—Then it was properly left to the jury.]

(a) There was a considerable conflict of evidence as to whether or not the defendant had agreed to pay the plaintiff's charges.

JERVIS, C. J.—I am of opinion that there should be no rule in this case. Ordinarily the contract is, that the party who employs the solicitor shall pay his charges. In the case of a mortgage, where the negotiation goes on, and the money is advanced, the charges of the mortgagee's solicitor are deducted out of the advance. If the mortgagor were insolvent, it could hardly be contended that the mortgagee would not be liable to his own solicitor. The proper remedy of the plaintiff in this case was against his own client, who might have recovered over against the now defendant. I see no misdirection; and, as my Brother Williams has not expressed himself dissatisfied with the verdict, there is no ground for disturbing it.

CRESWELL, J.—I also think the case was properly presented to the jury, and properly decided by them.

*321] *CROWDER, J.—The only implied contract here as to mortgagee's expenses would be between the mortgagor and the mortgagee: there is none as between the mortgagor and the mortgagee's solicitor. (a) The intention of the parties, as evidenced by the correspondence, was, to look to a completed transaction. So, with regard to the evidence of usage, it all related to transactions which resulted in the advance of the money. I think there should be no rule.

WILLES, J.—I am of the same opinion. The case of *Grissell v. Robinson*, 3 N. C. 10 (E. C. L. R. vol. 32), 3 Scott, 329 (E. C. L. R. vol. *322] 36), is almost *in point. There, pending a negotiation between the defendant and one P. for a lease of certain premises belonging to the latter, P. died: a suit in Chancery was instituted for the purpose of carrying his will into effect: the agreement between the defendant and P. not being in writing, and therefore not capable of being enforced in equity, the plaintiffs, the executors of P., consented to grant the defendant the lease upon the terms originally agreed on by their testator. The lease was accordingly prepared by their solicitor, and executed, but was retained by him, a part of the purchase-money

(a) See *Pratt v. Vizard*, 5 B. & Ad. 808 (E. C. L. R. vol. 27), 2 N. & M. 455 (E. C. L. R. vol. 28). There, A., wishing to borrow money on a mortgage of land, delivered the title-deeds to B., the intended mortgagee, for examination, and said that he would pay all expenses. B. handed the deeds to his own attorneys to be investigated. The negotiation went off, and the attorneys being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On assumpsit brought by A. against the attorneys to recover back the money so paid,—it was held, that the defendants could not be considered as having acted for both parties in the negotiation, and therefore had not a lien against A. as his attorneys; that, supposing A. liable to B. for the costs incurred, B. could not communicate to his own attorneys a lien upon A.'s deeds, by handing them to the attorneys for investigation; that the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s attorneys to detain the deeds, as it established no privity between them and A.; and that A. might have brought trover for the deeds, and was entitled to recover in that action. Lord Denman says: "Whether or not the defendants in this case had a lien on the title-deeds depends upon the question whether or not the plaintiff employed the defendants to do his work in respect of those deeds. Now the evidence shows that he did not. Their employment was for the intended mortgagee, and rather against than for the mortgagor. And, though there was a letter in which the mortgagor expressed himself willing to pay the expenses, that was addressed to the adverse party, and does not establish any privity between the mortgagor and the attorneys of the mortgagee."

remaining unpaid. The defendants afterwards paid the balance of the purchase-money, and demanded the lease, but refused to pay the expenses of preparing it. The plaintiffs having paid the expenses out of a fund in Chancery belonging to them as executors,—it was held, that, on proof of the usual course of business in such cases being for the lessor's solicitor to prepare the lease, and for the lessee to pay the expenses, the plaintiffs were entitled to recover the amount as money paid to the defendant's use; "for," says Tindal, C. J., "the payment was made in respect of a lease for which the defendant was ultimately bound to pay, and for which the plaintiffs were compellable to pay in the first instance, by virtue of the privity between them and Taylor." I think the case was properly left to the jury, and that there is no ground for quarrelling with their verdict.

Rule refused.

*HUMPHREYS *v.* FRANKS. *May 8.*

[*323

A. held promises of B., as tenant for a year, and so on from year to year so long as C. should live, the tenancy commencing at Christmas. After the death of A. (C. being also dead), A.'s widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—Held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice, to expire at Christmas.

THIS was an action of ejectment which was tried before Williams, J., at the second sitting at Westminster in this term, and in which a verdict was found for the plaintiff, subject to leave to move to enter a nonsuit, if the court should think there was no evidence to go to the jury of the determination of the tenancy by a regular notice to quit.

The premises in question originally belonged to one T. A. Forbes. He let them in December, 1844, to William Franks (the husband of the defendant) for one year, and so on from year to year so long as one Harriet Forbes (his mother) should live—possession to be given up within three months after her death. This tenancy commenced at Christmas. The tenant William Franks died in June, 1847. Harriet Forbes died in September, 1852. After the death of her husband, Mrs. Franks (the defendant) entered into an arrangement with T. A. Forbes to continue in the occupation of the premises upon the same terms as her husband had held them.

T. A. Forbes died, and by his will bequeathed the premises to one Roberts, who sold them to the plaintiff. At Midsummer, 1855, the plaintiff gave the defendant a six months' notice to quit, to expire at the end of the current year of the tenancy, treating it as a Christmas holding: and the question was, whether that was a good notice, or whether it should have been a notice to expire at the quarter-day preceding or succeeding the death of William Franks.

Pearce now moved for a rule nisi accordingly.

*324] JERVIS, C. J.—The plaintiff *Humphreys* takes the *interest which T. A. Forbes had in the premises, with the tenancy of the defendant as tenant from year to year upon the same terms as her husband had held them. Upon the whole, I think there was evidence to go to the jury of a tenancy from Christmas to Christmas, and that the notice was sufficient; and consequently there will be no rule.

CRESSWELL, J.—I think there was abundant evidence to justify the learned judge in assuming that the defendant held the premises upon the same terms on which her husband had held, viz., from Christmas to Christmas. I think it is impossible to say that there was no evidence for the jury.

CROWDER, J.—The intention of the parties is manifest, viz., that, notwithstanding the death of the husband, the tenancy should go on without interruption. It is enough to say that there was some evidence to warrant the jury in coming to that conclusion.

WILLES, J.—The original tenancy of the defendant's husband was a Christmas holding. The case is not very dissimilar to that of *Buckworth v. Simpson*, 1 C. M. & R. 884.† There, A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine the tenancy on giving a certain notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent: and it was held, that they were chargeable in their personal character upon the terms contained in the original demise,—their continuing to *325] occupy, and the landlord's abstaining from *giving notice to quit, raising an implied promise on their part to abide by the terms of the original contract. So, here, I think there was evidence that under the contract between the defendant, after the death of her husband, and the landlord, she was to be substituted for him as tenant. She was allowed to continue to hold in consideration of paying rent, nothing being said about the commencement of her tenancy. It was, therefore, natural that it should remain as before, a Christmas holding. It seems to me, not only that there was evidence, but such evidence that the jury could not properly have found that this was any other than a holding from Christmas to Christmas; and therefore I concur with my Lord and my learned Brothers that no rule ought to be granted.

Rule refused.

Where there is a lease, and a holding over after its expiration from year to year, the tenancy from year to year is upon the same terms as the original lease: *Fronty v. Wood*, 2 Hill (S. Carolina), 367; *Moore v. Beasley*, 3 Ham. 294; *Brown v. Knapp*, 1 Pick. 332; *Diller v. Roberts*, 13 Serg. & R. 60; *Bacon v. Brown*, 9 Conn. 334; *Phillips v. Monges*, 4 Whart. 226; *Haskins v. Pope*, 10 Alab. 493; *Jackson v. Patlerson*, 4 Harrington, 534.

BONSEY v. WORDSWORTH. May 6.

The plaintiff was a butcher carrying on his business within the jurisdiction of the county court of A. The defendant resided within the jurisdiction of the county court of B. The plaintiff sued the defendant in the superior court for a bill, some of the items of which consisted of goods which had been ordered in the A. district, but delivered in the B. district:—

Held,—confirming *Grimbley v. Aykroyd* and *Wood v. Perry*,—that the whole formed one “cause of action,” and, as a part of it arose in the jurisdiction within which the defendant resided (and within 20 miles), there was no concurrent jurisdiction within the 9 & 10 Vict. c. 95, s. 128, and consequently the plaintiff was not entitled to costs.

HONYMAN, in Hilary Term last, obtained a rule calling upon the defendant to show cause why the master should not be at liberty to tax and allow the plaintiff the costs of this action.

The rule was obtained upon the affidavit of the plaintiff, who deposed that he was a butcher and poulterer, and dwelt and resided, and carried on his business in High Street, Uxbridge, in the county of Middlesex, within the district of the county court of Middlesex holden at Uxbridge; that the defendant at the time the action was brought dwelt and resided, and still resided, *at Pond Farm, Seer Green, near Chalfont, in [326 the county of Buckingham, which is situate within the district of the county court of Buckingham holden at High Wycombe; that the action was brought to recover 10*l.*, balance of a bill of exchange for 20*l.* bearing date at Uxbridge on the 5th of June, 1855, and accepted by the defendant, payable at the Old Bank, Uxbridge, and interest thereon, and also to recover 7*l.* 18*s.*, balance of a bill for butcher’s meat supplied to the defendant by the plaintiff; that the Old Bank, Uxbridge, is situate in the district of the Uxbridge county court; *that all the orders for the delivery of such meat were given, and the meat purchased, weighed, and delivered at the plaintiff’s house in Uxbridge, to the servants of the defendant, or persons having his authority to receive the same, with the exception of certain portions of the same, which were purchased and ordered at the plaintiff’s shop at Uxbridge, and sent from his said shop at Uxbridge to his shop at Chalfont, and there delivered to the servants of the defendant, or persons sent by him for the same*; that the action was tried before the sheriff of Middlesex on the 29th of November last, when a verdict was found for the plaintiff for 18*l.* 1*s.* 4*d.*; and that the defendant, at the time this action was brought, did not dwell or carry on his business at any other place than Pond Farm aforesaid.

He submitted, that, for a portion of the cause of action, the plaintiff undoubtedly might have brought his action in the superior court; and that he did not lose that right by joining with it a cause of action for which a plaint might have been entered in the county court. And he referred to the 9 & 10 Vict. c. 95, ss. 128, 129, and to the cases of *Butler v. Corney*, 2 Exch. 477,† 6 D. & R. 45 (E. C. L. R. vol. 16), *Dodd v. Wigley*, 7 C. B. 106 (E. C. L. R. vol. 62), *Wood v. Perry*, 3 Exch. 442,† *Borthwick*, App., Walton, Resp., 15 C. B. 501 (E. C. L. R. vol. 80), and *Hernaman v. Smith*, 10 Exch. 659.†

*327] **Carter showed cause.(a)*—In order to entitle him to succeed upon this motion, the plaintiff must show that the action was brought for a cause for which concurrent jurisdiction is reserved to the superior courts by the 128th section of the 9 & 10 Vict. c. 95, that is, that “the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwelt or carried on his business at the time of the action brought.” [JERVIS, C. J.—Part of the cause of action was within the jurisdiction of the High Wycombe court; but part of the meat account was recoverable in the Uxbridge court, part having been ordered and delivered out of the jurisdiction in which the defendant resides.] The case of *Wood v. Perry*, 3 Exch. 442,† is precisely in point. It was there held, that, where the items in a plaintiff’s bill, under 20*l.*, are so connected together as to form one cause of action, and any *one* item arises within the jurisdiction of a county court within which the defendant dwells or carries on his business at the time of action brought, and the parties do not dwell more than twenty miles apart, the cause of action “in some material point” arises within such jurisdiction, and the superior court has no concurrent jurisdiction under s. 128, and the case falls within s. 129. The facts of that case were extremely analogous to the facts of the case now before the court. The plaintiff was a tailor, who resided and carried on his business in Chapel Street, Pentonville, within the jurisdiction of the Clerkenwell county court. *828] **The defendant was a hair dresser and perfumer, residing within the jurisdiction of the Brompton county court, and carrying on his business at the Burlington Arcade, within the jurisdiction of the Westminster county court. The plaintiff’s demand was for the amount of a bill containing various items of clothes made for and supplied to the defendant. As to three of the items of the plaintiff’s bill, the orders for them were given, and the goods delivered, at the defendant’s residence, within the Brompton jurisdiction, and the work done at the plaintiff’s residence. As to ten other items, the orders were given, and the goods delivered, at the Burlington Arcade, and the work done at the plaintiff’s residence: and, in one case, both the order was given, and the work done, and the goods delivered, at the plaintiff’s residence. And the court,—in conformity with the previous decision in Ex parte Aykroyd, 1 Exch. 479† (S. C., *Grimbley v. Aykroyd*, 3 D. & L. 701),—held that the whole constituted one cause of action, or “cause of one action,” within the act. Borthwick, App., *Walton*, Resp., and *Hernaman v. Smith*, proceeded upon the ground that the “cause of action,” in the 9 & 10 Vict. c. 95, s. 60, means “the *whole* cause of action.” Here, the acceptance of the bill was a material part of the*

(a) The affidavit of the defendant, upon which cause was shown, stated “that the bill of exchange upon which the action was brought, was accepted by him and delivered to the plaintiff on the day of the date thereof, at the defendant’s residence at Seer Green; that he resided there at the time of the commencement of the action; and that his said residence at Seer Green was not twenty miles distant from the residence of the plaintiff at Uxbridge.”

cause of action within the jurisdiction of the High Wycombe Court: *Roff v. Miller*, 19 Law Journ. C. P. 278. [JERVIS, C. J.—Mr. *Honyman* admits that: but he says the bill of exchange and the meat bill are separate causes of action, which is contrary to the decision of the Court of Exchequer in *Wood v. Perry*. There is a note by my Brother Manning to the case of *Dodd v. Wigley*, 7 C. B. 106, 114 (E. C. L. R. vol. 62), in which the matter is very well put. “When,” it is said, “goods are ordered of a tradesman on the 1st of January, and distinct orders for other goods are given on the 2d, 3d, 4th, 5th, &c., if, from the previous dealings between the parties, or from *general usage, or [*329 otherwise, it is to be inferred that it was contemplated by the parties, that, in the event of the dealing continuing, the several items should be included in weekly, monthly, quarterly, or yearly bills, the result of such an arrangement, and the legal position of the parties, seems to be this,—upon the delivery and acceptance of the first parcel of goods, delivered on the 1st of January, an entire contract is created, and a complete cause of action accrues, the tradesman being under no engagement to sell other goods, or to give credit beyond the price of the articles then delivered: when, on a subsequent day, other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment for the goods delivered on the 1st of January, and the purchaser agrees to pay for both parcels as upon one entire sale, et sic toties quoties.(a) After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action ex contractu will be the last. The distinction between a cause of action upon one entire contract, and one cause of action of contract, appears to be too refined to be readily appreciable.” That supports *Wood v. Perry* against the decision of this court; and I must confess I am disposed to agree with my Brother Manning’s observations, until I hear something more cogent the other way.] It is enough, on s. 128, that *any part* of the cause of action arises within the jurisdiction within which the defendant resides. The plaintiff has chosen to treat the whole as one cause of action.

Honyman, in support of the rule.—This is clearly a *case of [*330 concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95. That depends upon whether or not the cause of the action arose in some material point within the jurisdiction of the High Wycombe court. *Dodd v. Wigley* was rightly decided, and *Wood v. Perry* is distinguishable. [JERVIS, C. J.—The point was not decided in *Dodd v. Wigley*.] The question determined in *Wood v. Perry* first arose in *Grimbley v. Aykroyd*, where it was held that “cause of action” in s. 63, meant “cause of one action,” and was not limited to an action on one separate contract. With respect to Serjt. Manning’s note in *Dodd*

(a) As was suggested by Pollock, C. B., in the case of *In re Aykroyd*, 1 Exch. 490.†

v. Wigley, it may be observed that the statute of limitations might apply to part of the demand, a tradesman's bill not being like an attorney's, on which the right of action does not accrue until the action or suit is ended. [CRESSWELL, J., referred to *Rothery v. Munnings*, 1 B. & Ad. 15 (E. C. L. R. vol. 20).] If the plaintiff here had brought his action in the superior court to recover the price of the meat supplied at Uxbridge, and had afterwards sued the defendant in the High Wycombe county court for the price of the meat supplied at Chalfont, the latter could not have set up as a defence the judgment recovered in the first action. Is the plaintiff to lose his costs because he has abstained from harassing the defendant with two actions, but has included the whole in one? The court will pause before they put such a construction as that upon the statute. Assuming that this court will hold itself bound by the decision in *Wood v. Perry*, it is submitted that that case differs essentially from this. The words of the 128th section may either mean, "where part of the cause of action arose wholly," or "where the whole of the cause of action arose partially," within the jurisdiction of the inferior court. The Court of Exchequer in *Wood v. Perry* held them to mean the former. Here, no part of the whole cause of action,—according to the decision of *this court in *Borthwick, App., Walton, Resp.*, 15 C. B. *381] 501 (E. C. L. R. vol. 80), followed by the Court of Exchequer in *Hernaman v. Smith*, 10 Exch. 659,†—arose within the jurisdiction within which the defendant resided. In *Borthwick, App., Walton, Resp.*, the order for the goods was given at Oxford, where the defendant resided and carried on his business, and the delivery of them took place at Manchester; and the court held that the order was a material part of the cause of action, and therefore that the Manchester county court had no jurisdiction. Maule, J., there says: "Upon the critical construction of the words of the 60th section, as well as upon the spirit of the enactment, I think it clearly means the *whole* cause of action. And there is good reason for this. A defendant is liable to be sued in the place where he resides, and where the whole contract or cause of action arises. That is a thing which he can and is bound to take notice of: and it is convenient. The words of the section are plain and simple. When the legislature meant to deal with a *part* of the cause of action,—as in s. 128,—they knew how to express themselves. I think we are bound by the decisions of the Courts of Queen's Bench and Exchequer, to which we have been referred: and more especially by the cases of *Buckley v. Hann*, 5 Exch. 43,† and *Re Fuller*, 2 Ellis & B. 573 (E. C. L. R. vol. 75), in which latter case the Court of Queen's Bench thought the letters of administration an essential part of the cause of action. Everything that is requisite to show the action to be maintainable, is part of the cause of action." There is nothing in the case of *Wood v. Perry* that is at all repugnant to the view of the statute which is now presented. There, as to one class of items, the orders were given and

the goods supplied within the jurisdiction of the Clerkenwell county court. Here, *all* the orders were given at Uxbridge; no portion of the meat was ordered and *delivered within the jurisdiction of the High Wycombe county court. [JERVIS, C. J.—What were the circumstances in *Hernaman v. Smith*, 10 Exch. 659?†] An association of which the defendant was a member, offered a reward for the apprehension and prosecution of persons committing certain offences, such reward *to be paid on conviction*; and the plaintiff, within a district of the county court of Gloucestershire, apprehended an offender, who was tried and convicted within a district of the county court of Herefordshire: and it was held, that the county court of Gloucestershire had no jurisdiction to entertain a plaint for the recovery of the reward,—on the ground that the conviction was a part of the cause of action. [CRESSWELL, J.—What is the meaning of “some material point?”] Some material ingredient in the evidence: per Maule, J., in *Borthwick, App., Walton, Resp.* [CRESSWELL, J.—The order, then, is a material point; the delivery is another. If the order is given within one jurisdiction, and the delivery takes place within another, what is to happen?] The plaintiff is not bound to sue in either. At all events, this is a case for the exercise of the powers created by the 15 & 16 Vict. c. 54, s. 4. The 13th section of the 18 & 14 Vict. c. 61, provided for three cases which were to be excepted out of the operation of section 11, viz. 1, where it should appear to the judge at the trial that the action was brought for a cause in which concurrent jurisdiction was given to the superior courts by the 9 & 10 Vict. c. 95, s. 128,—2, that the cause of action was one for which a plaint could not have been entered in a county court,—3, that the cause was removed by certiorari. This court, in *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 73), held that this did not confer upon the court a mere *discretion*, but was imperative: and the legislature adopting that view, in the 15 & 16 Vict. c. 54, s. 4, provided a further case in *which the plaintiff was to be entitled to costs, viz. where it should be made to appear to the satisfaction of the court, or of a judge at chambers, that there was sufficient reason for bringing the action in the superior court. Is not this a case for costs under that section?

JERVIS, C. J.—The point last made is not, I think, one that we can entertain. As to the rest, the case is one of some nicety, and we will deliberate a little before we dispose of it. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the court. This was an application made by Mr. *Honyman* in the last term, calling upon the defendant to show cause why the plaintiff should not have costs, under the 128th section of the county court act, 9 & 10 Vict. c. 95.

Cause was shown by Mr. *Carter* in the early part of this term: and we think the rule must be discharged. The action was brought to recover the balance of a bill of exchange, and also the amount of an account

for butcher's meat supplied by the plaintiff to the defendant. The bill of exchange becomes immaterial; and the question turns entirely on the effect to be given to the butcher's bill. The plaintiff resided and carried on his business at Uxbridge, in the county of Middlesex, and within the jurisdiction of the Uxbridge County Court. The defendant resided at Seer Green, near Chalfont, in the county of Buckingham, and within the jurisdiction of the High Wycombe County Court. Most of the goods were ordered and delivered at Uxbridge, where the plaintiff resided; but some of them, though ordered there, were delivered to the defendant within the jurisdiction of the High Wycombe County Court. It was contended by Mr. *Carter*, on behalf of the defendant, that the

*334] *whole claim of the plaintiff constituted but one entire cause of action, and that, a material part of that cause of action, arising within the jurisdiction of the High Wycombe County Court, the action should have been brought there, and consequently the plaintiff was not entitled to costs. On the other hand, it was insisted by Mr. *Honyman*, on behalf of the plaintiff, that the claim did not constitute one entire cause of action, but that a part only of a part of the cause of action arose within the jurisdiction of the High Wycombe County Court, and therefore that the provision in question did not apply, and the plaintiff was at liberty to bring his action for the whole in the superior court. In the course of the argument, reliance was placed on the part of the plaintiff upon a case of *Dodd v. Wigley*, 7 C. B. 106 (E. C. L. R. vol. 62), where this court seemed disposed to decide, but did not actually decide, that, where some of the goods were delivered, or a portion of the work done, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, the case is brought within the second exception of the 128th section of the 9 & 10 Vict. c. 95. But the Court of Exchequer, in *Grimbley v. Aykroyd*, 1 Exch. 479,† 3 D. & L. 701, and *Wood v. Perry*, 3 Exch. 442,† 6 D. & L. 194, laid it down, that, where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be divided; or, in other words, that "cause of action" in the statute, meant "cause of one action," and were not to be limited to an action upon one separate contract: and they held, that, if any one item in such a bill

*335] *arises within the jurisdiction of a county court, the cause of action "in some material point" arises within that jurisdiction, and the superior court has not concurrent jurisdiction under the 128th section. Although it is undoubtedly extremely difficult to reconcile that view with the hypotheses which were forcibly put by Mr. *Honyman* in the course of his argument, we think it a convenient rule, and one which it

will be useful to abide by, seeing that it operates strict justice, and insures uniformity of decision on a question of considerable importance. We think, therefore, we must hold ourselves governed by the decisions of the Court of Exchequer in *Grimbley v. Aykroyd*, and *Wood v. Perry*, and that this must be considered as "one cause of action" arising upon the butcher's bill. Then, is it true, as Mr. *Honyman* suggests, that a material part of the cause of action here did not arise within the jurisdiction of the county court of High Wycombe within which the defendant resided, but only a part of a part of the cause of action? We think, that, though strictly and technically it is true that a part only of a part of the cause of action, viz., the delivery of certain joints of meat, took place within the jurisdiction of the High Wycombe County Court; yet, as the whole is to be taken as one cause of action, a material part of that cause of action arose within the jurisdiction of the High Wycombe County Court, and therefore that court had jurisdiction.

For these reasons we think the rule should be discharged.

Rule discharged.

Carter asked for costs.

JERVIS, C. J.—We have considered that matter; and we think there should be no costs. We incline to think *the plaintiff, after the case of *Dodd v. Wigley*, which certainly did seem to be a little [*386 in his favour, had fair ground for coming to the court.

Rule discharged, without costs.

POWELL and Another v. JESSOPP. April 19.

Shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the 4th section of the statute of frauds, in the absence of evidence that the shareholders take a direct interest in the freehold.

Upon the breach of a contract for the sale of shares, the proper measure of damages, is, the difference between the contract price and the market price at the time of the breach.

THIS was an action for damages for the non-delivery of certain shares in a mine called Wheal Guskus, in the county of Cornwall.

The first count of the declaration stated that the plaintiffs, at the request of the defendant, agreed to buy of and accept from the defendant, and the defendant agreed to sell and transfer to the plaintiffs, at or for the price of 1s. per share, divers, to wit, 1000 shares in a certain mine conducted on the cost-book principle, to wit, the Wheal Guskus Mine; and the plaintiffs averred performance of all conditions precedent, and that they, relying on the said agreement, paid the defendant for the said shares the said agreed price; and, although a reasonable time for the sale and transfer of the said shares had elapsed before the suit, and although all things had been done and happened, which ought to have been done and happened, on the part of the plaintiffs, to entitle

the plaintiffs to a sale and transfer of the said shares pursuant to the said agreement, and although the plaintiffs were ready and willing to accept the said shares, and to do all other things which it was necessary for them to be ready and willing to do to entitle them to have the said shares sold and transferred to them pursuant to their said agreement; *337] *shares, or any of them, to the plaintiffs, whereby the plaintiffs had not only uselessly made the said payment, but had been deprived of the said shares, and of divers great gains and profits which they might and otherwise would have acquired in consequence of a rise in the market value and prices of the said shares, but had been forced and obliged to pay a large increase on the price of the said shares so agreed to be sold as aforesaid, to wit, an increase or difference of 1s. 9d. per share, in purchasing other shares in lieu of those so agreed to be sold and transferred as aforesaid, and a further sum of, to wit, 6l. 5s., for the necessary expenses of and attending the purchase of such other shares, and the plaintiffs were otherwise damnified.

There was also a count for money received by the defendant for the use of the plaintiffs and for money found due on accounts stated between them.

Pleas,—first, that the defendant did not agree as alleged,—secondly, that the plaintiffs did not pay the defendant for the said shares the said agreed price, as alleged,—thirdly, that a reasonable time for the sale and transfer of the said shares had not elapsed before the suit, as alleged,—fourthly, that the plaintiffs were not ready and willing to accept the shares, as alleged,—fifthly, that, after the making of the said agreement in the first count mentioned, and before any breach thereof, it was agreed by and between the plaintiffs and the defendant, that neither of them the plaintiffs or the defendant should thereafter perform the said agreement on their or his part, and that the same should be waived, abandoned, and rescinded, and that the plaintiffs and the defendant should be respectively discharged therefrom, and they then respectively discharged each other from performing the said agreement on their respective parts, and the said agreement was then accordingly *338] waived, abandoned, *and wholly rescinded,—sixthly, payment into court of 25l. 10s. on the money counts.

The plaintiffs joined issue on the first, second, third, and fourth pleas respectively, took and joined issue on the fifth plea; and, as to the sixth plea, replied that the defendant was indebted to the plaintiffs to a greater amount than the said sum of 25l. 10s. in respect of the causes of action in the introductory part of the said sixth plea mentioned, and took and joined issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after last Michaelmas Term. The facts were as follows:—The plaintiffs were mining share-dealers in London: the defendant was a member of

the Stock Exchange. On the 18th of April, 1855, the plaintiffs agreed to buy of the defendant 1000 Wheal Guskus shares, at 1s. per share. On the 15th the plaintiffs sent the defendant a memorandum of which the following is a copy :—

“Name for 500 Guskus.

“George Fulton Blanch, Esq., 210 Regent Street.

“We will get the name for 500 more as soon as possible.

“POWELL & COOKE.”

On the same day, the defendant sent a transfer in the name of George Fulton Blanch to Mr. E. F. Inman (the person for whom he represented that he was instructed to sell the shares), for his signature; and the transfer was returned to him signed on the 29th, and the defendant forwarded it to the plaintiffs on the 30th. This transfer was as follows:—

“Mine Cost-Book Notice.

“London, 25th April, 1855.

“To ———, secretary or purser of Wheal Guskus Mine, situate in the parish of, St. Hilary, in the county of Cornwall.

*“We hereby request you to enter in the cost-book of Wheal Guskus Mine five hundred parts or shares into the name of George Fulton Blanch, of No. 210, Regent Street, London, in the county of Middlesex, with all benefit in the said parts, subject to the same rules, conditions, and regulations as we now hold the same, and for which this shall be your sufficient authority. [*339

“EDWARD F. INMAN.

“Witness, C. T., 20 Berners Street.

“I hereby agree to take and accept the above-named five hundred parts or shares, subject to the same rules, conditions, and regulations as E. F. Inman held the same, and to send or deliver this notice for registration within fourteen days from the above date.

“(Buyer's signature) ———.

“Witness.”

In exchange for the above transfer, the defendant received from the plaintiffs a check for 25*l.*, which was duly paid. On the same day, the defendant received from the plaintiffs the name of Henry Wilmington as the purchaser of the other 500 shares.

On the 4th of May, the plaintiffs received the following letter from the purser of the mine:—

“28 Queen Street, 4th May, 1855.

“Gentlemen,—I beg to inform you that the transfer of 500/10,000th shares in the Wheal Guskus Company, transferred by Mr. G. F. Inman to Mr. G. F. Blanch, handed me this day for registration, cannot be registered in the cost-book or transfer-book of the company, Mr. Inman not being registered in the cost-book as a shareholder.

“Yours, &c.,

“ALFRED JEFFREE, Secretary.”

“Messrs. Powell & Cooke.”

Upon receipt of this notice, the plaintiffs wrote to the defendant, as follows:—

"Sir,—The transfer of 500 shares in the Wheal Guskus Mine, for *340] which we paid you 25*l.* on the 30th ult., being a portion of 1000 shares which we bought of you on the 18th ult., is refused registration by the secretary of that company, in consequence of Mr. E. F. Inman not being registered in the cost-book as a shareholder.

"We hereby give you notice, that, if the whole number of 1000 shares be not delivered by the 8th instant, we shall instruct our broker, a member of your house, to proceed against you, in accordance with the rules provided by the Stock Exchange.

"Enclosed is a copy of a letter which we have this day received from the secretary of the Wheal Guskus Mine."

On the 8th of May, the defendant sent the plaintiffs two transfers for 500 shares each, requiring the secretary to register those shares in the names of G. F. Blanch, and Henry Wilmington. These transfers bore the signature of "P. Stainsby." These also were refused registration, on the ground that Stainsby had not paid his calls. Notice of the refusal having been given to the defendant's partner, that gentleman returned to the plaintiffs a check for 25*l.* which they had given for the second 500 shares.

On the 9th of May, the plaintiffs gave the defendant notice that they had instructed their broker to purchase 1000 Wheal Guskus shares, and should hold him responsible for the difference; and on the following day they again wrote, returning the transfers signed by Stainsby, and informing the defendant that they had bought 1000 shares at 2*s.* 9*d.* per share, and demanding the difference, and 6*l.* 5*s.* for brokerage.

On the part of the defendant, it was proved, that, by indenture of the 31st of May, 1851, Henry Thomas Hawkins granted unto Henry Francis and Matthew Henry Francis, their executors, administrators, and assigns, liberty to dig, work, mine, and search for tin, tin-ore, copper, copper-ore, lead, lead-ore, and all other metals and metallic minerals whatsoever, except marle or strata of clay, or quarries of stone, throughout all *341] that piece or parcel of ground situate in the parish of St. Hilary, in the county of Cornwall, bounded, &c., &c.; all which premises thereinbefore described, and within which liberty to work was thereby granted, were thereafter named and mentioned by and under the denomination of "limits;" all which said sett, mine, or adventure, was intended to be called Wheal Guskus; and the tin, tin-ore, copper, copper-ore, lead, lead-ore, and all other metals and minerals there found, to raise and bring to grass, and there to stamp and make mechanical, in such manner as is customary, and the same to take, carry away, and dispose of to their own use, and at their own will and pleasure (subject to the reservations thereafter contained); and within the said limits to dig and make such adits, shafts, pits, drifts, leats, or watercourses, and

to erect such sheds, houses, engines, and other buildings, as the said adventurers should from time to time think necessary or convenient for the more effectual exercise of the liberties, powers, and authorities thereby granted, &c. To have and to hold, use, exercise, and enjoy the said several liberties, licenses, powers, and authorities mentioned and intended to be thereby granted, and every of them, unto *the said adventurers, their present and future partners, co-adventurers*, executors, administrators, or assigns, to be by them or him exercised and enjoyed from the day of the date thereof for and during and unto the full end and term of twenty-one years, &c., at certain rents and royalties.

It further appeared that this license was afterwards assigned by Henry Francis and Matthew Henry Francis to Peter Stainsby, "his executors, administrators, and assigns, and his and their present and future partners or co-adventurers in the sett or adventure called Wheal Guskus." There was no evidence, however, that Stainsby had at the time of the assignment any co-adventurers associated with him: nor was it proved that he ever *executed any declaration of trust as to [*342 the mine, or that the defendant had any shares therein.

It was contended on behalf of the defendant, that the shares in question constituted an interest in land within the meaning of the 4th section of the statute of frauds, 29 Car. 2, c. 3, and consequently, that, in the absence of an agreement or memorandum in writing, no action could be maintained in respect of them: but the Lord Chief Justice was not asked to leave the question of fact to the jury.

In his summing up, his Lordship,—reserving for the court the question upon the statute of frauds,—told the jury to find for the plaintiff if they thought a reasonable time had elapsed for the defendant to perform the contract, and that he had failed to do so: and he further told them that the proper measure of damages for the breach of contract would be the difference between the contract price and the market price of the shares on the day on which the contract was broken, which, according to the evidence, was 2s. 6d. per share.

The jury returned a verdict for the plaintiffs, damages 106l.

Hawkins, in Hilary Term last, obtained a rule to show cause "why the verdict found for the plaintiffs on the first issue should not be set aside, and a verdict entered for the defendant, on the ground that shares in the Wheal Guskus mine constituted an interest in land within the meaning of the 4th section of the statute of frauds, and that no agreement or memorandum in writing to satisfy the said 4th section was proved at the trial, and that the judge should have directed the jury accordingly; or why there should not be a new trial, on the ground,—first, that the first of the above questions should have been left to the jury,—secondly, that the damages were excessive; or why the damages should not be reduced to 75l., *on the ground that [*343 the only damage recoverable in this action was, the difference

between the price of the shares stipulated in the contract declared on and the value proved at the trial, which difference was 1s. 6d. per share, and that the jury should have so found."

Bovill and *C. Pollock* now showed cause.—Not having been registered as a shareholder in the mine, the defendant had nothing to sell. But, assuming that he *was* possessed of shares in a mining company, it is now conclusively settled that a contract for the sale of shares in a mine is not necessarily a contract for an interest in land. In *Bligh v. Brent*, 2 Y. & C. 268,† shares in the Chelsea Waterworks Company were held to be personal property, and to pass by a will not executed according to the provisions of the statute of frauds. So, in *Sparling v. Parker*, 9 Beavan, 450, shares in a gas-light, and in a dock company, which possessed real estate for the purposes of their undertakings, were held not within the statute of mortmain, 9 G. 2, c. 36. So, of shares in the London Dock Company,—*Hilton v. Giraud*, 9 Beavan, 459, n. In *Myers v. Perigal*, 16 Simons, 533, shares in a joint stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of years, were held by Sir L. Shadwell, V. C., to be within the 9 G. 2, c. 36. The case came afterwards before Lord Truro, C., on appeal,—*Myers v. Perigal*, 2 De G. M’N. & G. 599,—where his Lordship remarked: “The cases bearing upon the point seem to divide themselves into three classes,—first, those of companies which are corporations, but corporations of the peculiar nature that each individual is entitled to a certain proportionate part of the profits resulting from the corporate property: with regard to these, there have been decisions *344] that the shares in the corporate property are not within the *mortmain act. I may mention as an example the case of *Bligh v. Brent*, which related to the Chelsea Waterworks, where it was held that the shares in that company were personalty, and passed under the old law by an unattested will; they were not considered as an interest in land within the mortmain act, because it appeared that the language of the charter of incorporation was much more suitable to personal than to real estate; and the court held that the interest of the corporation was an interest only in the surplus profits, and that the land was merely the instrument whereby the joint stock of money was made to produce profits. There is certainly a distinction between such corporations and ordinary corporations, in so far as that, generally speaking, members of a corporation have no specific share or interest in the profits of the corporate property, and cannot assign their interest in the corporate property; but, in the corporations of the former sort, each corporation has a separate and distinct assignable interest to the extent of his shares. The question, however, as to the interest of such a corporation, is quite distinct from that which comes under consideration in this case. A second class is that of joint stock companies established by deed, but not incorporated either by charter or act of parliament, and the only dis-

tion between such companies and companies established by act of parliament, is, that, in the latter case, the agreement or contract of partnership takes the form of law under the authority of the legislature. I particularly refer to those acts of parliament which establish joint stock companies, and which contain a clause that the interest of the shareholders shall be deemed personal estate. When that clause is embodied in an act of parliament, of course its enactments are legally binding, whatever may be their effect: but, when the same clause is contained in a deed of partnership, it may not have the same effect *at all, because parties cannot agree among themselves to alter [*345 the legal character or incidents attached to a certain description of property; and this appears to be the only distinction between companies constituted by deed and companies constituted by act of parliament. The third class comprises joint stock companies established by act of parliament; but, as the present is not one of those cases, we need not further consider what is the effect of a joint stock company so established." The case having been sent for the opinion of this court, they certified that the shares were *not* within the Mortmain Act,—*Myers v. Perigal*, 11 C. B. 90 (E. C. L. R. vol. 73): and, when the case came on again before Lord St. Leonards, that noble Lord said,—2 De G. M'N. & G. 619,—“If we look at the intention of the purchaser of these shares, it is obvious that he no more intended to buy an interest in any real estate which might form part of the partnership property, than to buy a portion of the real estate for his own use. By the very construction of the partnership deed, such real estate would have gone to his personal representatives, and his real representative could not have taken any portion of the estate by descent. Undoubtedly, as was put in the argument, a state of circumstances might arise in which one man might either be the survivor or the purchaser of the interests of his partners in the company, and thus become the possessor of the real estate; but, assuming such a result, he would take it in a new light, he would find himself owner of real estate, and, being the owner, he might of course elect to retain it a real estate. The respondents are under the necessity of admitting that real property purchased for the purpose of carrying on a trade would not fall within the statute. But, why not? Take the case of a dock company: the dock itself is constructed upon real estate *that remains realty while the partnership remains; [*346 but it is not denied at the bar that the buildings and offices of the company would not be real estate within the statute of mortmain: and the reason simply is, that the subject is of itself a necessary incident to the trade. Suppose this very company had bought real estate for the purpose of its trade, just as they might have bought a ship: it surely would have been competent for them to have done so. The true way to test it would be, to assume that there is real estate of the company vested in the proper persons under the provisions of the partnership

deed. Could any of the partners enter upon the lands, or claim any portion of the real estate for his private purposes? Or, if there was a house upon the land, could any two or more of the members enter into the occupation of such house? I apprehend they clearly could not; they would have no right to step upon the land; their whole interest in the property of the company is with reference to the shares bought, which represent their proportions of the profits. No encumbrancer of an individual member of the company would have any such right. In short, a member has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits, out of whatever property those profits might be found to have resulted. If he die at one particular time, he will leave the same interest in the partnership property, although that may consist of real estate at one period and not at another. The quality of the partnership property can neither alter its destination nor the quantum of a member's interest. Upon all principle, therefore, I think it is perfectly clear that this bequest is not within the statute." And, referring to a case of *Baxter, App., Brown, Resp., 7 M. & G. 198 (E. C. L. R. vol. 49.)*^(a) decided *347] "upon the registration act 6 & 7 Vict. c. 18, his lordship said: "A more difficult question arises from the consideration of the decision of *Baxter v. Brown*. I have some difficulty in reconciling that case with the later authorities: but, looking at the act of parliament regulating the qualification to vote, it gives the same right to vote in respect of an equitable interest as of the legal ownership; and the decision, therefore, only amounted to this, that the right to vote being conferred by act of parliament, could not be taken away except by act of parliament. If such was not the effect of that decision, it was undistinguishable from the later decision of the same court, which has now certified that this case does not fall within the statute of mortmain." In *Curling v. Flight*, 2 Phil. C. C. 613, where a bill was filed for specific performance of a contract for the purchase of mining shares, it was held that the purchaser was not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked; but that he was entitled to such evidence of the constitution of the company and of the nature of the title under which the mines are worked, as would show that the subject-matter of the purchase was what it professed to be, and that the proposed form of transfer to him would give him a valid title to the shares. The quality of shares in public companies was much considered in *Edwards v. Hall*, 25 Law Journ. Ch. 82, on appeal from a decision of Vice-Chancellor Wood,—see 11 Hare, 1. Lord Cranworth, C., there says: "The question now for decision is, as to the shares of incorporated companies. In these cases, there is always of necessity some land vested in the company in the concerns of which the shareholder is interested; and, what I have to

(a) S. C., per nom. *Baxter, App., Newman, Resp., 8 Scott, N. R. 1019.*

decide, is, whether a share in such a company is an estate or interest in land. These words 'estate or interest in land' are words of *very [348 extensive import, and it is not matter of surprise, that, from their vague generality, they have given rise to some contrariety of decision. Now, I cannot disguise from myself, that, if the point were now to be decided for the first time, there are (so at least it seems to me) forcible arguments in favour of the proposition that shares of this description *are* interests in land. The share derives, in many cases, its original, if not its only value from the use of the land. In the case of incorporated companies, if all the shares should become concentrated in one shareholder (I put an extreme case, certainly, though not an impossible one), that shareholder would at once become absolute owner of the whole property of the company, including the land. Why, then, it may be asked, while he is the owner of some only of the shares, is he not the owner of a proportional part of the land? On the other hand, every one must feel, that, in contending that such shares are interests in land, he is attributing to them a quality which no kind of authority ever understood them to possess. Such a conclusion must be arrived at, if at all, by refined reasoning on the legal qualities of such property, not obvious to the ordinary apprehension of the shareholders themselves. And, therefore, whatever doubt there might be if the question were *res integra*, to be now decided for the first time, I am glad to think it is, as it appears to me, settled by decision. The case of *Myers v. Perigal*, 2 De G. M'N. & G. 599, had the sanction first of the Court of Common Pleas, and afterwards of Lord St. Leonards in this court. That authority seems to me to decide the question of the shares now in dispute. By that authority I feel bound, according, as it does, with a great number of previous cases, and with, as I believe, the general understanding of the community. If that be the law as to the shares in a company not incorporated by charter or act of *parliament, it must be so as to shares in companies which *are* [349 so incorporated, and where the lands are held by the corporation itself, being a body, in theory at least, distinct from the shareholders of which it is composed. I do not feel called upon to review or discuss the previous cases. I consider the question to have been settled by *Myers v. Perigal*, from which I have neither the right nor inclination to depart." And, at the conclusion of the judgment, his Lordship added,—"I am aware, that, in thus deciding that the shares in these companies are not within the statute, I differ from the Master of the Rolls, in that case of *Ware v. Cumberlege*, 20 Beavan, 503. I do this with the less regret, because, after all, my decision rests quite as much on the necessity of adhering to prior decisions, as on the conviction that those decisions were in their origin such as I should have come to. His Honour did not think that *Myers v. Perigal* bound him, relating as that case did to a banking concern. I have already given my reasons for

thinking that it does govern this case : indeed, the reasoning there is applicable *à fortiori* to the present case." *Watson v. Spratley*, 10 Exch. 222,† is precisely in point. There, by indenture E. granted to Y., his executors, administrators, *co-adventurers*, and assigns, full license, power, and authority to dig, work, mine, and search for ore, minerals, and metals in and throughout certain limits, and the same to carry away and dispose of to their own use, for twenty-one years. The adventure was a joint stock company conducted on the cost-book principle. P. was the purser of the mine, which was purchased with money raised by calls on the shareholders. The mode of transferring shares was by a certificate of the sale, addressed by the vendor to the purser, and countersigned with an acceptance of the shares by the vendee; on the receipt of which certificate, the purser substituted the name of the latter in the *350] cost-book for *that of the vendor. Sometimes the shareholders signed off their names in the cost-book; in which case they ceased to be shareholders, and there was paid to them the value of their shares, estimated with reference to the machinery and ore, but not the mine: and it was held by Martin, B., and Platt, B., that shares in this company were not an interest in land within the 4th section of the statute of frauds; and by Parke, B., and Alderson, B., that it was a question of fact for the jury, whether, under the above circumstances, the purser held the mine and machinery in trust to employ the machinery in working the mine and making a profit of it for the benefit of the co-adventurers, who were to share the profits only, in which case the shares might be bargained for and transferred by parol,—or whether the purser held the mine in trust for himself and his co-adventurers, present and future, in proportion to their number of shares, and, if so, there was a direct trust in the realty, and consequently neither a bargain for, nor a transfer of, a share in such trust could be made without a note in writing. [JERVIS, C. J.—That seems to be exactly like this case.] It will be attempted to distinguish that case from the present, on the ground that here the grant was to Stainsby and his co-adventurers. That, however, passed no interest to the defendant: it could not operate an assignment to a person not in existence. The learned judge was not asked to leave it to the jury to say whether or not the interest of the shareholders in this mine was such as to bring it within the 4th section of the statute of frauds; and therefore the omission to leave it to them is no ground for granting a new trial: *Martin v. The Great Northern Railway Company*, 16 C. B. 179 (E. C. L. R. vol. 81). Then, as to the damages,—the amount the plaintiffs were entitled to recover, was, the difference between the price of the shares stipulated in the contract declared on, *351] and the value proved at the *trial, viz. 1s. 6d. per share. It was a mere mistake to take the verdict for the larger sum.

J. C. F. S. Day and *Leake* showed cause.—Under the assignment of the license of the 31st of May, 1851, the interest in the mine in ques-

tion vested in Stainsby and his future co-adventurers; and therefore the present case stands clear of the difficulty presented in *Watson v. Spratley*, 10 Exch. 222.† In *Toppin v. Lomas*, 16 C. B. 145, 161 (E. C. L. R. vol. 81),—where it was held that bonds granted pursuant to the Westminster Improvement Acts, 8 & 9 Vict. c. clxxviii., 10 & 11 Vict. c. cxxxi., 13 & 14 Vict. c. cii., and 16 & 17 Vict. c. clxxvi., conferred upon the holder an interest in land within the meaning of the 4th section of the statute of frauds,—Maule, J., says: “*Watson v. Spratley* clearly is no authority to show that this is not a contract for an interest in land: all that it shows, is, that another section of the statute of frauds has received a construction which would strike one as being contrary to the natural meaning of the words used.” [JERVIS, C. J.—*Toppin v. Lomas* turned upon the express terms of the acts of parliament. There was an express charge by mortgage in favour of the bond-holders.] Here, each shareholder has a definite portion of the land, as in the case of the New River, *Townsend v. Nash*, 3 Atk. 386, and not, as in *Bligh v. Brent*, 2 Y. & C. 294,† a mere interest in the surplus profits. The question is, are the profits of the company necessarily derived from real estate, or is the possession of real property merely incident to the mode of conducting the business? The shares in *Myers v. Perigal* could not well have been held to be any other than personal estate. The Master of the Rolls (Sir J. Romilly), in *Ware v. Cumberlege*, 20 Beavan, 503, speaking of the decision of Wood, V. C., in *Edwards v. Hall*, says: “If it were not for the case of *Edwards v. Hall*, *upon which, [*352 although I have not the grounds of the decision, I place great weight, I should have no hesitation as to the decision which I should come to in this case. The distinction, if it can be supported, must be between a company incorporated by act of parliament, and a mere association of individuals; the former of which, it is said, so alters the property taken by a corporation as to make it not obnoxious to the mortmain act, although, in any other case, it remains obnoxious to the mortmain act. This is a distinction of so fine and delicate a description, that it is very likely to lead to serious difficulty and great litigation. I think one of the worst evils that can exist in expounding the law, is, the creating and supporting distinctions of so shadowy a character, and that the best exposition of the law will be found to be by laying down broad principles, and disregarding narrow and minute distinctions. I doubt also whether the distinction can be supported in reason. It certainly is inconsistent with many of the cases to be found in the books. It does not appear to be in accordance with the view taken by Lord St. Leonards in the case of *Myers v. Perigal*, 2 De G. M’N. & G. 599, nor with the view taken by Lord Justice Knight Bruce, in the case of *Ashton v. Lord Langdale*, 4 De G. & Sm. 402: the distinction seems to be of the most singular description, because it is, that the members of a corporation do not hold the land in their individual character, but hold it amongst

them in their corporate character; and, therefore, what they really possess for one and the same purpose, is altered by a name given them by the legislature merely for the purpose of conveniently suing and being sued. The view which I have always taken of this subject, is, that, where the substance of the undertaking is a dealing with land, and that land is of the essence of the thing which creates the junction of these parties together, whether incorporated or not, *853] *the case falls within the provisions of the statute of mortmain."

The inclination of Lord Cranworth's mind, unfettered by precedent, unquestionably was, in *Edwards v. Hall*, that shares like these are interests in land. The distinction is well put by Lord Langdale, in *Sparing v. Parker*, 9 Beavan, 450. The true test is, whether the profits are derived principally from land. That that is peculiarly so in the case of a mine, it would be idle to urge. Here, there was either a legal estate or a clearly-defined equitable estate in the land in the shareholders; and that distinguishes the case from *Watson v. Spratley*. The true distinction is that suggested by Lord St. Leonards in *Myers v. Perigal*, 2 De G. M'N. & G. 620, where he says: "Take the case of a dock company; the dock itself is constructed upon real estate, that remains really while the partnership remains; but it is not denied at the bar that the buildings and offices of the company would not be real estate within the statute of mortmain; and the reason simply is, that the subject is of itself a necessary incident to the trade." In *Myers v. Perigal*, the object of the trade was, the dealing in money. In the case of a mining company, the sole object of the company is, the dealing in minerals. Every shareholder here has a control over the power of disposition of the land. [WILLES, J.—What is the difference between this case and *Watson v. Spratley* as to the assignment? What is the express trust here that is necessary, as Parke, B., and Alderson, B., say, to confer an interest in the land?] The habendum to Stainsby, his executors, &c., and his and their present and future partners and co-adventurers. [WILLES, J.—This is a deed inter partes?] Yes. [WILLES, J.—Then, does any interest pass under it to any one but Stainsby?] Undoubtedly not, but for the statute 8 & 9 Vict. c. 106, s. 5. [WILLES, J.—That has no more effect than if the names of the parties had been *854] mentioned in *the indenture. But, what is the express trust here?] If the shareholders take the legal estate, there is no necessity for express trusts. [WILLES, J.—If these shares give the holders a right to profits only, all the court in *Watson v. Spratley* held that they would not confer an interest in land.] The sale here is of a "part or share" of what Stainsby and his co-adventurers had. [WILLES, J.—That is, the interest which each shareholder takes in a cost-book mine; and that is, a share of profits as and when they are made, not an interest in land.] The question is, what interest a purchaser would get who bought the whole concern from Stainsby alone.

JERVIS, C. J.—It seems to me, without discussing the quality of the interest which the defendant professed to sell in this case, we must hold ourselves bound by the case of *Watson v. Spratley*, which is a distinct authority to show that shares in a mine worked upon the cost-book principle do not constitute an interest in land. I feel the less difficulty in coming to that conclusion, that this is a case in which there may be an appeal to the court of error. It is inexpedient to throw out doubts. I do not, therefore, say what my opinion would have been if the matter had stood denuded of all authority, though I incline to think, that, even in that case, I should hold these shares not to be an interest in land, and therefore not to come within the 4th section of the statute of frauds. But I found my decision upon this, that *Watson v. Spratley* binds this court. With respect to the damages, the verdict was taken for the larger sum by mistake: that will be arranged. As to the rest, it was agreed at the trial that there was no question for the jury. It was clearly the intention of the parties to take the opinion of the court upon the point of law.

CRESWELL, J.—I also think this rule should be *discharged. I avoid binding myself by any expression of opinion. I act en- [*355
tirely upon the authority of *Watson v. Spratley*.

CROWDER, J.—I also agree to decide this case simply and entirely upon the authority of *Watson v. Spratley*.

WILLES, J., concurred.

Rule discharged,—the plaintiffs consenting that the damages should be reduced to 75*l*.

PENNELL and Another, Assignees of WILLIAM GRANT, a Bankrupt, v. WILLIAM HENRY DAWSON and ENEAS DAWSON.

April 28.

A trader, in consideration of advances in cash and goods, assigned all his stock to the defendants, to secure such advances and also a debt previously due to them. The goods so assigned comprised all his property, except some household furniture and book-debts. In an action by the assignees of the trader to recover the value of the goods seized under this bill of sale, the judge left it to the jury, with very strong observations, to say whether they would infer an intent to defeat and delay creditors. The jury having found for the plaintiffs,—the court, thinking they might have been misled by the observations of the learned judge, granted a new trial, the costs to abide the event.

THIS was an action by the assignees of William Grant, a bankrupt, to recover the value of the stock in trade of the bankrupt, which had been seized and sold by the defendants under a bill of sale bearing date the 7th of June, 1855, by which the same had been conveyed to them by the bankrupt in consideration of certain advances.

The cause was tried before Jervis, C. J., at the sittings in London after last Michaelmas Term. The only question was whether the bill

of sale was an act of bankruptcy, as being a conveyance with intent to defeat or delay creditors within the 67th section of the *Bankrupt Act, 12 & 13 Vict. c. 106. The facts were as follows:—

William Grant carried on the business of a news-vender and librarian at Brighton. In January, 1855, Grant was indebted to the defendants, who were wholesale booksellers and news-agents in London, to the extent of about 700*l.*; and he was likewise indebted to various other creditors to the extent of about 650*l.* or 700*l.* more. Grant still requiring to be supplied with the daily newspapers to enable him to continue his trade, and the defendants declining to continue such supply without security, Grant mortgaged to them certain policies of insurance (which were almost worthless), and also some leasehold and copyhold property, subject to a prior mortgage. In May, 1855, there was an execution in Grant's house for 23*l.* 7*s.* 6*d.*, and 20*l.* was due for taxes, and it was necessary that he should be kept supplied with papers. Under these circumstances, the defendants were appealed to, and they agreed to advance the money to pay out the execution and to pay the taxes, and to supply the papers for a fortnight; and an undertaking was given to them, signed by Grant and by his solicitor, to the following effect:—

“Messrs. Dawson,—In consideration of your paying on account of Mr. William Grant the sum of 23*l.* 7*s.* 6*d.* for execution against him at the suit of Messrs. Bradbury & Evans, advancing to him the sum of 20*l.* for taxes, and 12*l.* for weekly papers, and supplying the daily papers until Wednesday next, I hereby undertake, on his behalf, that you shall be entitled to remove books to the value of 155*l.* 7*s.* 6*d.* as security for repayment thereof.”

An estimate having been made of the value of Grant's unencumbered property, and it being found not more than enough to pay his creditors *357] 5*s.* in the pound, it *was arranged between him and the defendants that the latter should offer a composition of that amount to all the creditors (to be paid by them), they taking the business, and carrying it on for their own benefit, and Grant being employed as their clerk or manager at a weekly salary, until their debt should be fully paid; they taking a bill of sale of the stock as a security. The creditors not agreeing to this proposal, in order to enable Grant to carry on his business and supply his customers, it was arranged that the defendants should continue to supply him with papers, and that they should take as security for such supply (excluding the then existing debt) a bill of sale of the whole of Grant's stock in trade. The bill of sale was as follows:—

“This indenture made the 7th of June, 1855, between William Grant, of, &c., news-vender and librarian, of the one part, and W. H. Dawson and E. Dawson, of, &c., stationers, of the other part: Whereas the said William Grant is indebted to the said W. H. Dawson and E. Dawson in the sum of 700*l.*, the payment whereof, with interest, is secured to them

by a mortgage of a certain copyhold messuage or dwelling-house, No. 72 Queen's Road, Brighton, and a leasehold messuage, No. 5 Castle Square, Brighton, and of a policy of assurance upon the life of the said William Grant, and which mortgage is dated the 1st of February last: And whereas the said William Grant is also indebted to the said W. H. Dawson and E. Dawson in the further sum of 167*l.* 7*s.* 6*d.* for goods supplied by them to him, and for money lent by them to him and paid to or for his use, *for which said sum they have a charge upon the stock in trade in and upon the said messuages in Queen's Road and Castle Square*: And whereas the said William Grant is also indebted to the said W. H. Dawson and E. Dawson in the further sum of 182*l.* 12*s.* 6*d.* (a) for *which they hold no security; and he is likewise indebted to other persons in various sums which he is unable to pay in full; but expects shortly to effect a compromise: And whereas the said William Grant has requested the said W. H. Dawson and E. Dawson to continue to supply him with newspapers and other publications required by him in his said business, and with such sums of money as they may think necessary to enable him to carry on his said business whilst he is negotiating with his other creditors; and he has also requested them not to remove the said stock in trade, but to allow the same to remain on the said premises; which they have agreed to do, upon having the said stock in trade assigned to them for further securing to them the payment of the said sum of 167*l.* 7*s.* 6*d.*, and also for securing to them the payment of such further sum and sums of money as for the time being shall be due from them to him for newspapers and other publications supplied to him, and for money lent to him or paid by them for his use, for enabling him to carry on his said business from the 2d day of June instant: Now this indenture witnesseth, that, in consideration of the said debts or sums of money so due and owing from the said William Grant to the said W. H. Dawson and E. Dawson, and of their so continuing to supply him so long as they may think fit with newspapers and other publications, and to make advances to him to enable him to carry on his said business, he, the said William Grant, doth hereby assign and transfer unto the said W. H. Dawson and E. Dawson, their executors, administrators, and assigns, *all and singular the stock in trade, goods, wares, and merchandise now in or upon the premises, No. 72 Queen's Road, Brighton aforesaid, and No. 5 Castle Square, Brighton aforesaid, and which shall hereafter be thereon, respectively*, and all the right, title, interest, claim and demand whatsoever, both at law and in equity, of him the said William Grant of, *in, to, or out of the same; together with full power and authority for them the said W. H. Dawson and E. Dawson, their executors, administrators, and assigns, or any person authorized by them, to enter upon the premises aforesaid, and to take and retain possession of the

(a) This should have been 132*l.* 12*s.* 6*d.*

said stock in trade, goods, wares, and merchandise, and effects hereinbefore assigned, or intended so to be; to have and to hold the said stock in trade, goods, wares, and merchandise, hereinbefore assigned, or intended so to be, unto the said W. H. Dawson and E. Dawson, their executors, administrators, and assigns, for their own absolute use and benefit; nevertheless, upon the trusts and for the purposes hereinafter declared concerning the same: And it is hereby declared and agreed by and between the said parties hereto, that the said W. H. Dawson and E. Dawson, their executors, administrators, and assigns, shall stand possessed of the said stock in trade, goods, wares, and merchandise expressed to be hereby assigned, upon trust to take possession of the same, and at any time or times hereafter, without any further consent, and notwithstanding the dissent of the said William Grant, his executors or administrators, or any person claiming under him or them, absolutely to sell and dispose of the same, or any part thereof respectively, by public auction, unto any person or persons whomsoever, and in one or more lot or lots, and either in or upon the aforesaid premises or elsewhere, and in such manner in all respects as the said W. H. Dawson and E. Dawson, their executors, administrators, or assigns, shall think proper, and for such prices as they shall consider sufficient, with power to buy in the same, or any part thereof respectively, at any public sale, and to rescind any contract for sale, and again to offer the same for sale, without being responsible for any loss or expenses thereby occasioned; *360] and to stand possessed of the clear *moneys to arise from such sale or sales, upon trust, in the first place, to retain thereout the costs of and incident to the preparation and execution of these presents, and all costs, charges, and expenses of and incidental to taking and retaining possession, and of and incidental to such sale or sales, or otherwise in relation to the trusts created by these presents; and, in the next place, to apply such moneys, so far as the same will extend, *in payment to the said W. H. Dawson and E. Dawson, their executors, administrators, or assigns, the said sum of 167l. 7s. 6d., and all and every such sum and sums of money as for the time being shall be due and owing to them from the said William Grant for newspapers and other publications supplied by the said W. H. Dawson and E. Dawson, and for advances made to him or for his use for enabling him to carry on his said business since the said 2d of June*, with interest thereon respectively at the rate of 5l. per cent. per annum; and, if there be any surplus, after making such several payments and deductions as aforesaid, upon trust to pay the same unto the said William Grant, his executors, administrators, or assigns, or as he or they shall direct: Provided always, and it is hereby agreed and declared that all sums of money which shall be received by the said W. H. Dawson and E. Dawson from the said business since the said 2d of June by virtue of this present security, shall be given credit for in account with the said William Grant." It

also contained a proviso that the receipts of Messrs. Dawson should be sufficient discharges, and that they should not be answerable for involuntary losses.

At the time this bill of sale was given, Grant was indebted to the defendants to the amount of 1120*l.* 15*s.* 8*d.* For a portion of this, viz. 700*l.*, they held a mortgage of the leaseholds and copyholds before mentioned, and a policy of insurance, the extreme value of which security was about 270*l.* The remaining debts of Grant were *about 650*l.* or 700*l.* His stock in trade (which consisted principally [*361 of an old circulating library) was valued by himself at 3000*l.*, but, when subsequently sold by auction under the bill of sale, realized, after payment of rent and expenses, the sum of 278*l.* 7*s.* 9*d.* only. There were also debts due to him, varying from a few shillings to 6*l.* or 7*l.*, amounting in the aggregate to about 440*l.* And the good-will of the business was said to be worth about 250*l.* or 300*l.*

Under these circumstances, it was submitted on the part of the plaintiffs, that the execution of the bill of sale was an act of bankruptcy, and the deed fraudulent and void as tending to defeat or delay creditors.

On the part of the defendants it was insisted, that, inasmuch as the object of the bill of sale was, not to defeat or delay Grant's creditors, but, on the contrary, was expressly designed to enable him to continue his trade, and was not a conveyance of *all* his property, or of the whole with a colourable exception, it was not fraudulent and void, nor an act of bankruptcy.

The Lord Chief Justice, in leaving the case to the jury, told them that the question for them to consider, was, whether the deed of the 7th of June, 1855, was executed with a view and intent to delay and defeat the creditors. He then proceeded in substance thus:—No doubt, as a proposition of law and common sense, every man must be supposed to contemplate the natural consequences of his own acts; and, if this deed naturally does defeat, and naturally does delay, the rights and remedies of creditors, unless there be circumstances supervening to alter that necessary consequence, you will presume that that was intended which the deed necessarily does. It does not follow, however, that the execution of a deed conveying all the property is an act of bankruptcy; because the very essence of trade is, to sell and buy; and, if a man can sell the whole of his *stock for 1000*l.*, which is [*362 worth only 800*l.* or 900*l.*, he is carrying on his business. It has been and is a question whether that one single act of sweeping away may or may not have the effect of defeating or delaying creditors, where accompanied by other circumstances, because it facilitates the carrying away of an amount of property. But each case must depend upon its own circumstances. Grant, the bankrupt, says this,—“I had a business worth 200*l.* a year, or more. I had a stock worth 3000*l.* :”

and he swears positively that it cost him from 4000*l.* to 5000*l.* "I had property which I had mortgaged to the full extent; and, amongst others, I owed Dawsons a sum secured on mortgage. I owed them two further sums of 167*l.* 7*s.* 6*d.* and 132*l.* 12*s.* 6*d.*" And now comes the important part of the case. "My business was such that I required supplies daily of papers, comparatively of small amount" (compared with the nature of his debt due to Dawsons). "They" (for, this is the effect of his evidence) "used my exigency in wanting the papers, as a screw to compel me to assign all my property to them, on these terms, that they were to pay my creditors 5*s.* in the pound, and to pay themselves in full." If that is true, that is defeating and delaying with a vengeance. That was the first bargain. If that were so, there could be no question. Some of the creditors decline to accede to the proposed arrangement. Then, what happens? Why, upon condition that a future supply shall take place for an uncertain time,—so long as they please,—Grant assigns the whole of his stock to the defendants. Does that delay the creditors? Why, the moment they came in under the deed,—as they might have done the next day,—and stopped the supply of papers, the creditors could not levy an execution on the premises. To that extent they were defeated and delayed. The defendants' counsel contends that the object was, not to defeat or delay the other creditors, or to give the *defendants a preference or advantage, but *363] simply to enable Grant to continue his trade. They had no right to bargain with him to assign over the whole of his property, to defeat his creditors, for the small consideration, which might be nominal, and might be stopped the next day. It is a question for you. It is for you to say whether this was done with the intention of delaying and defeating the creditors. If it has that effect, nobody can doubt for a moment that this would be an improper assignment. Was there any reason to believe it would not have that effect? The necessary consequence was, that Messrs. Dawsons, the instant that deed was executed, might have stopped the supply of papers, and swept away all the goods. You will say whether in this case that was their intention: if you think it was, there is an end of the case, and your verdict will be for the plaintiffs. If, on the other hand, you think it was not done with that view, but, as Mr. *Bovill* says, simply to assist the creditors, and to enable Grant to go on, and so to enable him to pay his other creditors,—which is a very strong proposition, as it seems to me,—you will find for the defendants. Everything that is tangible is assigned over, except the book-debts: and the book-debts are such as surely a creditor of Grant for 80*l.* or 40*l.*, with a judgment and execution, would be delayed, if, instead of finding something on the premises whereon he could levy, he had to collect debts of trifling amount from persons many of whom no doubt were only occasional visitors at Brighton. It is true there is greater facility afforded now, by the process of attachment; but that will not

alter the law. If you think, that, by taking the bulk of the property, and changing it from Grant to the Messrs. Dawson, that defeated or delayed the creditors, your verdict will be for the plaintiffs. If you think otherwise, your verdict will be for the defendants.

*The jury having returned a verdict for the plaintiffs,

Bovill, in Hilary Term last, obtained a rule nisi for a new trial, [*364 on the grounds,—first, that the verdict was against evidence,—secondly, that his Lordship misdirected the jury in leaving it too strongly to them that they were to infer the intention to defeat and delay creditors from the effect of the bill of sale, and for not leaving the question properly to the jury under the 67th section of the Bankrupt Act, 12 & 13 Vict. c. 106,—thirdly, on the ground of surprise. The affidavits stated that the stock in trade was sold under the bill of sale by auctioneers of respectability, and that the defendants were surprised by the statements made by the bankrupt at the trial as to the value of the stock, and were consequently unprepared to contradict it. The following cases were referred to,—*Baxter v. Pritchard*, 1 Ad. & E. 456 (E. C. L. R. vol. 28), 8 N. & M. 688, *Rose v. Haycock*, 1 Ad. & E. 460 n., 3 N. & M. 644 n., *Harwood v. Bartlett*, 8 Scott, 171, 6 N. C. 61 (E. C. L. R. vol. 37), *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72), and *Smith v. Cannan*, 2 Ellis & B. 35 (E. C. L. R. vol. 75).

J. H. Hodgson (with whom was *Byles*, Serjt.) showed cause.—By the bill of sale, with the exception of his book-debts, the bankrupt absolutely denuded himself of all his property, and of all means of paying his other creditors a sixpence. As to 167*l.* 7*s.* 6*d.*, it may be said there was a consideration, inasmuch as, in equity, what is agreed to be done must be considered as done: *Hutton v. Cruttwell*, 2 Ellis & B. 15 (E. C. L. R. vol. 75). But, as to the 132*l.* 12*s.* 6*d.*, the defendants had no security, and to that extent the assignment was for a past consideration, that portion of the debt not having been incurred upon the faith of any assignment being executed. *Graham v. Chapman*, 12 C. B. 85 (E. C. L. R. vol. 74), is precisely in point. There, a trader, in consideration of a past debt of *240*l.*, and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving [*365 the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer: and it was held, that, inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy within the 12 & 13 Vict. c. 106, s. 67. That was followed by *Smith v. Cannan*, 2 Ellis & B. 35 (E. C. L. R. vol. 75), which came before the Exchequer Chamber on a bill of exceptions. G., a farmer, conveyed all his farming stock and goods to S. by bill of sale, by way of security for about 900*l.*, with power of sale. The property comprised in the bill of sale

was of about the value of 2800*l.*; and there was a trust for G. of the surplus of the property comprehended in the bill of sale, which was the whole of G.'s property, with the exception of two shares in a joint stock bank, of the value of 17*l.* 10*s.* each. S. seized and sold enough of the stock to pay the amount secured. G. was declared bankrupt, as a banker. The bill of sale was *bonâ fide* given under pressure; and the trade of the bankrupt was not affected by giving it. In trover by G.'s assignees against S., issues being joined on pleas of not guilty and not possessed, and the judge at Nisi Prius having ruled that these facts were evidence on which the jury might find a verdict for the plaintiff,—it was held by the court of error, that the necessary consequence of an assignment of what is substantially all the trader's property, is, to delay his creditors, and that the existence of a resulting trust, and of a substantial surplus, does not prevent its having that effect; and that a conveyance delaying a trader's creditors is an act of bankruptcy, though it *366] has not the effect of *stopping his trade; and that a transaction, being itself an act of bankruptcy, is not protected, though made with a party who has no notice of the circumstances making it an act of bankruptcy; and, consequently, that the facts proved were evidence on which the jury might find for the plaintiffs, and the direction was therefore right. Parke, B., there says: "The test is, not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader." The circumstance that here the deed contemplated a future supply of papers and other publications necessary to the continuance of the bankrupt's trade, makes no difference. The deed must be construed as if the question arose the moment after its execution. The defendants bound themselves to nothing: the supply might have been stopped next day. The circumstances were pregnant to show that the transaction was fraudulent, and that the necessary consequence of the deed was to defeat and delay creditors. The verdict was clearly warranted by the evidence. And there is no ground for saying that the jury were misdirected. The Lord Chief Justice, no doubt, made some strong observations; but that is no ground for granting a new trial,—*Davidson v. Stanley*, 3 Scott, N. R. 49, 2 M. & G. 721 (E. C. L. R. vol. 40). Neither is there any ground for the alleged surprise: the defendants might have called witnesses at the trial to contradict the bankrupt's statement as to the value of the stock.

Bovill and Cleasby, in support of the rule.—The bill of sale was a security given for a future consideration, in the same sense as that in *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72), and clearly was no act of bankruptcy. To make a transfer of part of a trader's property an act of bankruptcy, it must be fraudulent and made with *367] intent to defeat or delay creditors. [CRESSWELL, J.—What do *you mean by fraudulent?] Fraud assumes so many aspects

that it is extremely difficult to define it. [CRESSWELL, J.—Is an intent to delay creditors a fraud?] No doubt. [CRESSWELL, J.—Then, if a deed is executed with intent to delay creditors, it is fraudulent.] No fraud was intended or perpetrated here. This was not an assignment of *all* Grant's property. The recital confines it to his stock in trade: see *Payler v. Homersham*, 4 M. & Selw. 423, and the cases collected in the notes to *Roe v. Tranmarr* (Willes, 682), in 2 Smith's Leading Cases, 4th edit. p. 414. And the evidence showed that, besides this, Grant had household furniture worth 47*l.*, and book-debts to the amount of about 450*l.* The question, then, is, whether an assignment of a part of a man's property, partly for a past debt, and partly for a future debt, is an act of bankruptcy. [JERVIS, C. J.—I certainly thought that the defendants were doing the best they could for themselves, with the co-operation of Grant, who was entirely in their hands.] In *Worsley v. De Mattos*, 1 Burr. 467, 478, Lord Mansfield says: "There is a great difference between the conveyance of *all* and of a *part*. A conveyance of a part may be public, fair, and honest: as a trader may sell, so he may openly transfer many kinds of property by way of security; but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." And at the end of the judgment he says,— "Under all the circumstances, we are of opinion that this conveyance of the bankrupt's *whole* substance to De Mattos, though by way of security, and for valuable consideration, is fraudulent and an act of bankruptcy. The determination here is, upon the assignment of *all*." [JERVIS, C. J.—In *Smith v. Cannan*, Mr. Baron Parke says that the supposition that the exception of part makes a difference "is founded on a misapprehension of the reasons given by the judges in the older *cases, founded on expressions used by them with reference to the particular circumstances under discussion in these cases." In [*368 *Wilson v. Day*, 2 Burr. 827, where it was held that a colourable exception of part of the effects out of the assignment will not prevent the operation of the bankrupt laws, the language of Lord Mansfield is still stronger. "Though," he says, "a trader, before he becomes a bankrupt, may prefer one creditor to another, and may pay him his debt, or may make a mortgage, with possession delivered, or (as was the case of *Small v. Oudley*, 2 P. Wms. 427) may assign *part* of his effects to one particular creditor, yet an assignment of his *whole* estate is of a very different consideration. That tends to defeat the whole system of the bankrupt laws." Wilmot, J., said: "This conveyance of the *whole*, without leaving anything at all remaining towards satisfying the rest of his creditors, is a very different case from an assignment of a particular *part* of his effects to a particular creditor." And Lord Mansfield added that "a colourable exception of a *small part* of his estate or effects would not help the matter; for, the court would never suffer that an *evasion* should prevail to take such a case out of the general rule, which is so

essentially necessary to be observed in order to a due execution of this system of laws." In *Young v. Ward*, 8 Exch. 221,† it was held that the assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not per se an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business. A manufacturer assigned, by way of mortgage, all his machinery, as a security for certain bills of exchange drawn by him upon certain of his customers, accepted by them, and discounted by the mortgagee, and also *369] for such other bills as should from time to time be discounted in like manner; and the *amount of the security was not to exceed 2000*l.*; and the mortgagee was empowered, in default of payment of the bills, three days after demand, to enter the premises, and to take possession of all the machinery, and to sell the same, and, after payment of the amount of the bills then due or running, to pay the surplus of the proceeds of the sale to the mortgagors. At the time of the execution of the deed, the machinery was worth 1500*l.*, and the trader's effects much exceeded 3000*l.*; and he deposed that the deed was executed with a view to obtain cash for the bills, and without any intent to defeat or delay his creditors. And it was held that there was no evidence to constitute the execution of the assignment an act of bankruptcy; and, further, that, if there had been any such evidence, the proper question for the jury was, not, whether the deed, if acted upon, would have stopped the business, but whether it would have produced insolvency. [JERVIS, C. J.—Is not the proper question,—Do you infer from the deed, and from the surrounding circumstances, an intention to defeat and delay creditors?] So to leave it to the jury, without explanation, necessarily would mislead them. It was impossible for the jury to come to any other conclusion than that which they came to in this case, from the manner in which it was presented to them. They should have been told, that, if they believed that the deed was executed bonâ fide in furtherance of a previous agreement, it was not an act of bankruptcy, and they must find for the defendants. In *Graham v. Chapman*, the deed conveyed *the whole* of the bankrupt's property, even the consideration paid for the very assignment itself. So, *Smith v. Cannan* was the case of an assignment of *all* the bankrupt's available property, with a resulting trust. Here, *part* only was assigned. The facts of this *370] case are all fours with *Hutton v. Cruttwell*. Assuming that the summing up was right, the verdict *clearly was not justified by the evidence. Then, as to surprise, the defendants went down prepared to sustain the validity of the assignment: they had no reason to expect that the bankrupt would give such evidence as to the value of the stock as he did.

CRESSWELL, J.—I am of opinion that the summing up of the Lord Chief Justice (who takes no part in this decision), taken literally, was

quite correct. But, at the same time, we are all of opinion that there are one or two passages in it which may very well have been misunderstood, and that the jury may have supposed it was intended as a direction in point of law, and not a mere expression of his Lordship's opinion in point of fact. We therefore think there should be a new trial, the costs to abide the event.

Rule absolute accordingly.(a)

(c) The cause was tried again, at the sittings in London after Trinity Term, 1856, before Willes, J., when a verdict was found for the defendants.

END OF EASTER TERM.

IN THE EXCHEQUER CHAMBER.

EASTER VACATION, 19 VICTORIA.

TATTON v. WADE. *May 9.*

An action will lie for a false representation in *writing* as to the character and circumstances of a third person, whereby the plaintiff was induced to give credit to such third person, although the plaintiff might have been in part influenced by subsequent *oral* representations of the defendant,—if the jury are satisfied that the plaintiff was *substantially* induced by the written representation to give the credit.

THIS was an action upon the case for a fraudulent misrepresentation of the credit and character of a third person.

The declaration stated, that, before the committing of the grievance by the defendant (below) thereafter mentioned, Robert Case applied to the plaintiff (below), and requested her to let on hire and deliver to him certain household furniture of great value, the property of the plaintiff (below), for reward to be therefore paid by the said Robert Case to the plaintiff (below) in that behalf; that thereupon, the plaintiff (below), being unacquainted with the credit, circumstances, and character of the said Robert Case, was referred by him to the defendant (below) for information respecting the same, whereof the defendant (below) then had notice, and was then applied to by the plaintiff (below) respecting the character and circumstances of the said Robert Case with reference to the matter aforesaid; that thereupon the defendant (below), by then falsely and fraudulently representing to the plaintiff (below) that she the defendant (below) had known the said Robert Case for some years, and that, should the defendant (below) arrange with the said Robert Case to take the said furniture, she the plaintiff (below) need be under no apprehension of his honesty, *and that the said Robert Case held a very [372 responsible situation, and therefore there was nothing for the

plaintiff (below) to fear, induced the plaintiff (below) to let on hire and deliver, and the plaintiff (below), relying on the said representation of the defendant (below), and believing the same to be true, did let on hire and deliver the said household furniture to the said Robert Case for reward to be therefore paid by the said Robert Case to the plaintiff (below); whereas, in truth and in fact, at the time the defendant (below) so made the said representation, the said Robert Case was not an honest man, but was then a very dishonest man, and was not in a responsible situation, or in any situation, and was not likely to take care of or safely keep the said furniture during the said hiring, or to return the same to the plaintiff (below) at the end of the said hiring, or to pay to the plaintiff (below) the reward for the said hiring, as the defendant (below) then well knew; and the defendant (below) thereby then falsely and fraudulently deceived the plaintiff (below) as aforesaid; whereby and by means of the premises the plaintiff (below) had lost the reward agreed to be paid to her by the said Robert Case for the use of the said household furniture, and the same was wholly due and unpaid to the plaintiff (below), and divers articles of the said household furniture had become and were wholly lost to her,—the same having been either wrongfully removed, carried away, and converted to his own use by the said Robert Case, or distrained and sold for rent due from him whilst in his possession under the said letting, and the plaintiff (below) had been put to great expense in obtaining possession of other of the articles of the said household furniture, and been obliged to pay and had paid rent due from the said Robert Case for which the said articles were distrained whilst in his possession under the said letting, and the charges of a distress for *373] such *rent, to prevent the said furniture from being sold for such rent, and had also been obliged to pay and had paid other charges and expenses in and about searching for and recovering the said furniture, and obtaining repossession thereof, and the said furniture was, whilst in the possession of the said Robert Case under the said letting, much damaged, and the plaintiff (below) had been and was by means of the premises otherwise injured, &c.

The defendant (below) pleaded not guilty, whereupon issue was joined.

The cause was tried before Crowder, J., at the first sitting at Westminster in Easter Term last. The plaintiff, upon her examination, stated that Robert Case applied to and requested her to let on hire to him certain household furniture at a certain rent, Case stating to her at the time of such application that he was a clerk in the employ of an insurance company, at a salary of 100*l.* a year, and 50*l.* besides for other services, paid monthly; that she, the plaintiff, then required a reference from the said Robert Case, and that Case then referred her to the defendant; that she, the plaintiff, thereupon wrote and sent a letter to the defendant, which letter was then produced and given in evidence on the part of the plaintiff, and was in the words and figures following:—

"I am referred to you by Mr. Case, who has applied to me, in answer to my advertisement in the Times, respecting the hire of my furniture. I should have written before respecting Mr. Case, but thought it better to keep the matter open for a week, before applying to the referees. As a matter of course, it behoves me to be very cautious; and, perhaps, as you are related to Mr. Case, and doubtless feel interested about them, you would have no objection to become guarantee for the safety and regular payment (a quarter in advance) of *the furniture. I shall feel obliged by a few lines in return, as I shall wait your [*374 answer before applying to other referees. Yours, &c.

"E. WADE."

And, that, in answer thereto, she, the plaintiff, received a letter written and sent to her by the defendant, which letter was then produced and given in evidence on the part of the plaintiff, and was in the words and figures following:—

"19th November, 1853.

"I ought to apologize for not having answered your note sooner; but illness prevented. I have known Mr. Case some years; and, should you arrange with him to take the furniture, you need not be under any apprehension of his honesty: and he holds a very responsible situation; therefore there is nothing to fear. As regards the security, I have mentioned that to him, and he objects to give personal security for furniture; so that the matter must rest between you and Mr. Case."

That, after receiving the last-mentioned letter, she, the plaintiff, had an interview with the said Robert Case, and told him that she wished to see his employers, and that the said Robert Case then objected thereto, saying that he had been so short a time in their employ that he should not wish so delicate a matter as hiring furniture to be named to them; that she, the plaintiff, then said to him, "You cannot expect me to rely on your word, and I must see some person who will assure me that your statement is correct, or I must decline;" that, after the last-mentioned interview with the said Robert Case, she, the plaintiff, called upon and had an interview with the defendant, and that at such interview she, the plaintiff, took with her the letter which she had received from the defendant, and held it in her hand, and apologized to her for troubling her a second time, *after receiving her note, and she, the plaintiff, said to the defendant, "I am sorry to trouble you again [*375 about Mr. Case, but he objects to my seeing his employers, and, unless you assure me he is employed as he states, I must decline treating with him;" and that thereupon the defendant then said to the plaintiff, "You may depend upon it;" and that she, the plaintiff, then said to the defendant, "The amount of his salary is scarcely adequate to the expenses he is incurring," and that the defendant thereupon said to the plaintiff, "He has engaged two clerks out of the office of the company, at 30s. per week for board and lodging;" and that the plaintiff then said to the

defendant, "It would have been more satisfactory if I had called upon his employers," and that in answer thereto, the defendant then said to the plaintiff, "It would be better for him to decline the furniture than that you should do so;" and that the plaintiff then said to the defendant, "*If you, as a respectable person, assure me his statement is correct, I shall close with him,*" and that, in answer thereto, the defendant then said to the plaintiff, "*You may do so with perfect safety;*" that, after the last-mentioned interview and conversation with the defendant, she, the plaintiff, let on hire and delivered the within-mentioned furniture to the said Robert Case as alleged in the declaration.

Upon her cross-examination, the plaintiff said that she was not quite satisfied with the answer, unless she could see the said Robert Case's employers, and so informed the said Robert Case at her aforesaid interview with him after she had received the said letter of the defendant, and before her aforesaid interview with the defendant, and that the said Robert Case, in answer thereto, then referred her to the defendant; that she then required of the said Robert Case that the defendant should *876] satisfy her of the truth of his statement, and that **she would not have gone on with the transaction without the defendant had assured her that the said Robert Case's statement was correct*, and that she then said to the said Robert Case, "I must have an assurance from some person that your statement is correct, or I shall decline," and that he then said the defendant would do that; that her object in going to the defendant, was, that the defendant might assure her that the statement of the said Robert Case was correct; *that she relied on the statements aforesaid made by the defendant at the interview with the defendant; that it was the statements aforesaid made at this interview that induced her to trust the said Robert Case; that she should have refused him certainly, if the defendant had not made the statements aforesaid at that interview; and that it was the defendant's representations aforesaid at that interview that induced her to part with her furniture aforesaid.*

Upon re-examination, the plaintiff stated *that she relied on the defendant's said letter also, and that she would not have let the said Robert Case have the said furniture without that letter.*

On the part of the defendant, it was insisted, that the jury ought to find a verdict for the defendant, if they believed the evidence given by the plaintiff, and that she would not have parted with her furniture unless she had received the defendant's oral representations aforesaid, and required the learned judge so to direct the jury.

The learned judge, however, told the jury "that the result of the evidence was, that the plaintiff was induced partly by the letter of the defendant aforesaid, and partly by the oral representations of the defendant aforesaid, to part with her furniture aforesaid; but that, if they were of opinion, and believed, that the plaintiff was substantially and

mainly induced by the letter of the defendant aforesaid to part with her furniture aforesaid, the plaintiff was entitled to their verdict."

*The counsel for the defendant excepted to that ruling, and insisted that the jury ought to find a verdict for the defendant, [*377 if they believed the evidence given by the plaintiff, and that she would not have parted with her furniture aforesaid unless she had received the defendant's *oral representations* aforesaid.

The jury having found for the plaintiff, the exceptions were now brought by writ of error to the Exchequer Chamber, and argued before Pollock, C. B., Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., and Bramwell, B.

Kingdon, for the plaintiff in error.—The 6th section 9 G. 4, c. 14, enacts that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,* unless such representation or assurance be made in writing, signed by the party to be charged therewith." The question to be raised upon this bill of exceptions, is, whether, to bring a case within that statute, the *whole* representation or assurance must not be in writing,—whether it applies to a case in which part of the alleged misrepresentation was in writing and part oral. It appears that Case, who proposed to hire certain furniture of the plaintiff, had made a statement to the effect that he was a clerk in a certain office, receiving a certain amount of salary, referring to the defendant generally: and it is very material to observe, that the plaintiff's letter does not in terms ask for *information*, but for a *guarantee*. Now, the defendant's answer, declining to become security, merely states collaterally that she has known Case some years, that the plaintiff need be under no apprehension of his honesty, *and that he [*378 held a responsible situation, and therefore there was nothing to fear. The plaintiff being dissatisfied still, an interview took place between her and the defendant, at which the former said "Unless you assure me he (Case) is employed as he states, I must decline treating with him;" to which the defendant answered, "You may depend upon it." At this interview, the plaintiff again says to the defendant, "If you as a respectable person assure me his statement is correct, I shall close with him;" and the defendant in answer said, "You may do so with perfect safety." This shows that the plaintiff was not relying upon the written representation at all. [POLLOCK, C. B.—All this might be very good argument in support of a motion for a new trial. It might be contended that the plaintiff did not mainly, or at all, rely upon the defendant's letter. But the question is, whether the learned judge was wrong in his direction to the jury.] It is impossible to deal with the ruling of the judge, without dealing with the evidence upon which it is

founded. [POLLOCK, C. B.—Do you mean to contend that the written representation is to be altogether disregarded, if anything false is added orally?] No. The learned judge states the result of the evidence to be, that the plaintiff was induced partly by the defendant's letter, and partly by her oral representations, to part with her furniture. [POLLOCK, C. B.—The question is whether the proposition of the learned judge was correct in point of law,—that, there being false representations^(a) made both in writing and orally, if the jury thought that the plaintiff was substantially and mainly induced by the letter to part with her furniture, she was entitled to their verdict.] That the plaintiff *379] acted mainly upon the oral representations, is perfectly manifest. [BRAMWELL, B.—The substance of your argument is, that the damage complained of did not flow from the *written* statement?] Precisely so. It is submitted that the *whole* of the representation by which the plaintiff is induced to do that which leads to the damage, must be in writing. The whole statement need not be in writing; but the whole inducement for the plaintiff to do the thing which results in the cause of action. [BRAMWELL, B.—In short, you say that the inducement to act must be the statement in writing, and nothing else. COLERIDGE, J.—Suppose two persons subscribe a written character, might not the party who acts upon it, and sustains damage from its falsehood, have an action against one?] No doubt he might. [POLLOCK, C. B.—Suppose the plaintiff had stated the substance of this direction in his declaration, would it have been bad on general demurrer?] If it showed that a material part of the inducement for the plaintiff to give credit did not comply with the statute, it is submitted that it would. [POLLOCK, C. B.—It is difficult to see how the question could be left to the jury otherwise than by asking them whether they thought that the written representation substantially and mainly produced the injury. ALDERSON, B.—Suppose an oral statement had been made, and the plaintiff, being in doubt, asks for a representation in writing, and, having got it, is still wavering, and ultimately is induced to act upon a further oral statement,—would an action lie?] In jure, non remota causa, sed proxima spectatur. If regard is to be paid to the immediate cause operating upon the plaintiff's mind, it clearly was the oral representation. [WIGHTMAN, J.—I should have thought there was no difficulty, if the word "mainly" had been left out. ALDERSON, B.—And I, if the word "substantially" had been omitted. ERLE, J. *380] —*Assuming that the plaintiff was influenced both by the written and the oral statement, and the oral statement was made last, I am of opinion that the defendant is liable. You never could ask a jury if they thought the letter *alone* induced the plaintiff to part with his goods. No man acts upon a single inducement. The appearance

(a) It is worthy of remark, that there was nothing upon the face of the bill of exceptions to show that the statements vouched by the defendant were false, or that the plaintiff had sustained any damage.

and demeanour of Case must have operated in some degree upon the plaintiff's mind. ALDERSON, B.—Suppose the plaintiff had *required* two written statements (from different persons), and these were given at different times. The persons giving them would not be jointly liable. According to your argument, neither would be liable, though each is a *causa sine qua non*. Is not the letter here *causa sine qua non* ?] In the case put,—which, however, differs widely from this,—there would be a cause of action complete against each. But that is not precisely this case. Where the same person makes two separate and distinct representations, one being in writing, the other not, and each operates upon the mind of the person to whom the representations are made, how are they to be separated ? Formerly, these representations as to the character and credit of third persons were thought to be within the 4th section of the statute of frauds, 29 Car. 2, c. 3, until that was set right by the case of *Pasley v. Freeman*, 3 T. R. 51. In *Lyde v. Barnard*, 1 M. & W. 101, 114,† Parke, B., says,—“Since the case of *Pasley v. Freeman*, it is well known, from some reported cases, and from others which have not found their way into the books, that a practice had grown up of fixing a person with the debt of another, by parol evidence of a representation as to the solvency or trustworthiness of a third person, and proof that credit was given on the faith of that representation. The practice did not extend to *all* cases within the statute of frauds. That statute applies to a *guarantee, for good consideration, for a debt *already contracted*, [*381 as well as where credit was to be given : but the evil existed only in those cases in which credit was subsequently given on the faith of the representation made. In this respect, the practice of bringing actions on such parol representations was an evasion of the statute of frauds : and Lord Tenterden (who framed the act), I think, meant to put all the cases on the same footing, where one, on the personal credit of another, gave personal credit to a third, and to make it necessary that there should be a note in writing where such credit was given on the faith of a representation, as well as where it was given on the faith of a positive promise. I consider, therefore, the mischief to be this, and no more.” [POLLOCK, C. B.—Lord Tenterden told me that his motive for introducing that provision into the bill, was, that he was struck with the remarkable fact, that, numerous as actions of the sort were,—actions for false representations as to the character and credit of third persons,—the plaintiff almost invariably succeeded ; which induced him to think there was some latent injustice which required a remedy. That is the true history of that enactment.] Parke, B., and Alderson, B., in *Lyde v. Barnard*, treat the 6th section of the 9 G. 4, c. 14, as having brought back this species of action within the pale of the statute of frauds. Under that statute, it has been held that the promise is an entire thing, and if void in part for not being in writing it is void altogether, and cannot be made the subject of an action : per

Lord Tenterden, in *Thomas v. Williams*, 10 B. & C. 664, 671 (E. C. L. R. vol. 21). So, by parity of reasoning, the representation, being entire, cannot be good as to part and void as to the rest. All the authorities upon this subject are collected in the notes to *Chandler v. Lopus*, Cro. Jac. 2, in 1 Smith's Leading Cases, 4th edit. pp. 144—146, *882] *where the precise point now before the court, viz. whether in a case depending partly but not wholly on such misrepresentations, parol evidence would be admissible, is said not yet to have been solemnly decided. To entitle the plaintiff to recover, she was bound to show that the damage complained of flowed from the representation set out in the declaration. If the false representations of two persons made at separate times could be said to have caused the damage, no doubt both might be sued. [POLLOCK, C. B.—An action might be brought against any one who mainly and substantially contributed to the wrong. In the case put, either might be sued, but I apprehend the plaintiff could not recover damages against both.] It might be matter for the equitable jurisdiction of the Court. [BRAMWELL, B.—If A. makes a false statement, upon which the plaintiff would not have acted, but for a subsequent false statement by B., A. would not be liable to an action. B. would be the *causa causans*. COLERIDGE, J.—Suppose two persons on separate occasions speak defamatory words of me, which are actionable only by reason of special damage, and I sustain damage in consequence of the speaking of *all* the words,—may I not maintain an action against either of them?] If no damage would have resulted from the first speaking, but for the confirmation of the last speaker, the latter only, it is submitted, would be the person liable.

Hugh Hill, contra.—If the ruling of the learned judge in this case be held to be wrong, a party taking a reference as to the character or credit of another must in future be content with *one* referee. To entitle a plaintiff to maintain an action of this sort, *fraud* and *damage* must concur. It is not disputed here that there was fraud. The question is, *383] whether it is necessary that the *fraud charged in the declaration should be found to have been the sole cause of the damage, or whether it is not enough if it substantially caused the damage, although something else might also have been contributory thereto. The declaration alleges that the defendant made a false and fraudulent representation as to the character and circumstances of Case, and that, in consequence of that false and fraudulent representation, the plaintiff parted with her goods. The evidence showed a representation in writing as alleged in the declaration, and also subsequent oral representations to the same effect; and the plaintiff proved that she would not have parted with her goods but for the *written* representation. The learned judge fairly stated the result of the evidence to be, that the plaintiff was induced partly by the defendant's letter, and partly by her oral representations, to let Case have the furniture: but that, if they believed that

the plaintiff was substantially and mainly induced by the defendant's letter to part with her furniture, she was entitled to their verdict. It is difficult to see how otherwise the case could have been left. It is scarcely possible to conceive a case in which a party is influenced by one single simple motive. Relying substantially upon the defendant's written representation, is the plaintiff to lose her remedy because she may have been somewhat influenced by the subsequent oral representations of the defendant or the plausible appearance and manner of the party she was dealing with? Whether she really was influenced by the one statement or the other, was matter for comment on the part of counsel to the jury. But, if the written representation was substantially the cause of the damage of which the plaintiff complains, it is properly the subject of an action. [ALDERSON, B.—If the plaintiff sustained any damage from the written representation, the rest would *be mere matter of computation for the jury.] Precisely so. A man asks [*384 for credit, referring to A. and B. A. writes an answer, stating that he knows him well, and that he is employed as secretary to a railway company, with a salary of 500*l.* a year, which turns out to be false. The inquirer, not knowing A., pauses until he receives B.'s answer. B. writes, saying that he knew the party some years ago, and believed him to be then responsible and trustworthy, but that he knows nothing of his present circumstances. Upon this the required credit is given, and the result is, a loss to the creditor. Is A. the less liable for his false representation, because the credit would not have been given, but for the true representation subsequently made by B.? Or, would he be less liable, if B.'s statement also were false? The priority of the statements, or the degree of influence each may possibly have on the mind of the person to whom they are made, surely cannot be the criterion of liability.

After a short conference, *Hill* was informed that the court did not desire to hear him further.

POLLOCK, C. B.—I can very well understand the dissatisfaction felt by Mr. *Kingdon* at the result of the trial; and I can perfectly enter into the view which he takes, when, the plaintiff having almost admitted herself out of court by the answers which she had given on cross-examination, to the effect that it was the statements verbally made by the defendant that induced her to trust Case, and that she would certainly have refused to do so but for those representations, stated, on re-examination, that she relied on the defendant's letter also, and that she would not have let Case have the furniture without that letter. The learned judge then had *before him the evidence of the plaintiff, first, [*385 generally stating the circumstances out of which the cause of action arose, then, on cross-examination, admitting that the defendant's oral representations induced her to trust Case, and then on re-examination averring that she would not have trusted Case but for the written statements,—the words probably being put into her mouth by the adroit-

ness of counsel. It is not for us to say whether the jury have come to a right conclusion, or what their verdict ought to have been. But the question for us to consider simply is, whether or not the case was properly left to them. It is clear upon the evidence that the plaintiff in part may have relied on the oral and in part on the written representations. Then, the learned judge, inasmuch as the defendant would not be responsible for what passed by word of mouth, but would be for the statements contained in the letter, tells the jury, that, if they believe that the plaintiff was substantially and mainly induced by the letter of the defendant to part with her furniture, the plaintiff was entitled to their verdict. I am of opinion that that direction was perfectly free from objection. It may be that the jury ought to have come to a different conclusion: but the question is, was the direction right. I think it was perfectly right. I take it to be clear, that, if a person does an act for which he is by law responsible,—and a person making a false representation in writing is responsible in law,—he is liable to be sued for the mischief he has occasioned; and it is no answer to say that something else in part contributed to it (not being the consequence of the conduct of the defendant himself). If the false representation in writing substantially contributed to the injury of which the plaintiff complains, the defendant is clearly responsible. I think our judgment ought to be for the plaintiff.

*386] **ALDERSON, B.**—I also think the question was entirely for the jury. The evidence shows that the plaintiff at least partly acted upon the written representation. For all the damage resulting from that representation, therefore, the defendant is clearly liable.

COLERIDGE, J.—I am of the same opinion. In substance, exactly the right question was put to the jury. The 6th section of the statute, upon which the question turns, enacts that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith: it leaves everything else to the general principle of law. What is that general principle? Why, that there must, in order to sustain an action of this sort, be *damnum et injuria*. No doubt, there was abundant evidence of *injuria* here; and it was for the jury to say whether or not the *injuria* produced the *damnum*. That is entirely a question for them. The defendant must pay damages wholly for the *injuria*.

WIGHTMAN, J.—I am of the same opinion. The allegation in the declaration is, that the plaintiff was induced by the false and fraudulent representation of the defendant to give credit to Case,—that is, by the representation which was proved by the writing. The plaintiff, in her

evidence, says that the oral representations induced her to part with her furniture, but that she relied on the letter also, and would not have let Case have the furniture without that letter. The *direction of the learned judge thereupon is, that the result of the evidence [*387 was, that the plaintiff was induced partly by the letter of the defendant, and partly by her oral representations, to part with her furniture: but that, if they believed that she was *substantially and mainly* induced so to do by the defendant's letter, the plaintiff was entitled to their verdict. I think that direction was quite correct. If the written representation was *not* a substantive cause of the injury, the jury should have found for the defendant: but, if it *was* a substantial inducement to the injury, it is no answer to say that other representations not in writing in some measure conduced to it also.

CROMPTON, J.—I am of the same opinion. It is clear that the plaintiff has sustained a wrong at the hands of the defendant; and the only question is, whether the learned judge properly left the case to the jury. The way in which I understood him to have put it, is, would the injury have happened without the letter? If it would not, it is no answer to say that something else also contributed to the injury of which the plaintiff complains.

BRAMWELL, B.—The real question is,—though I must confess I have entertained a little doubt,—whether there is a continuing contributory cause; whether the plaintiff acted upon the written representation. If there was, all concurs that is essential to the maintenance of the action. The jury should apportion the damages to that which is occasioned by the writing. What does the declaration charge? Not that the plaintiff was induced to intrust her furniture to Case *solely* in consequence of the defendant's letter? If so, there would be much weight in Mr. *Kingdon's* argument. That, *however, is not the meaning of the declaration. But I think the proper way to deal with the declaration, is, to treat it as meaning that the defendant did that which was an inducing cause of the injury the plaintiff has sustained. The learned judge sums up almost in the very words of the declaration. He tells the jury that the result of the evidence is, that the plaintiff was induced partly by the letter and partly by the oral representations of the defendant to part with her furniture; but that, if they believed that the plaintiff was *substantially and mainly* induced by the letter to do as she did, she was entitled to their verdict. I concur with the rest of the court in thinking that that direction was perfectly correct. [*388

Judgment for the plaintiff.

*389] ***The Reverend RICHARD GOLDHAM, Clerk, v. The Reverend SAMUEL VALENTINE EDWARDS, Clerk. May 9.**

To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory-house and premises, B. pleaded, that A., being rector of C., and B. incumbent of D., it was agreed between them, with the consent of their respective patrons and diocesans, that they should exchange their respective livings in their then state and condition, "and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them :—"

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the plea did not necessarily disclose a simoniacal contract.

Held also, that a plea,—whether coming before the court on motion for judgment non obstante verdicto or on demurrer,—is to receive a fair and reasonable construction ; and, if ambiguous, to be construed most strongly against the party pleading.

THIS was an action by an incoming against an outgoing incumbent, for dilapidations to the parsonage house and premises.

The first count of the declaration stated, that, by the law and custom of England hitherto used and approved of, all and singular the rectors of this kingdom for the time being are bound and ought to repair and sustain all and singular the houses, buildings, and tenements of and belonging to their respective rectories, and leave the same, so repaired, supported, and sustained, to their successors, and, in default of so doing, are bound to satisfy so much as should be necessary to be expended or paid for the necessary repairs thereof: that the defendant was rector of the parish church of the parish of Caldecot, in the county of Hertford, and, as such rector, before and at the time of the resignation therein-after mentioned, was, in right of his said rectory, seised in fee of and in the chancel of the said parish church of Caldecot, and of certain houses, buildings, and lands, and of and in divers fences to the said lands belonging: that the defendant, being so seised as aforesaid, resigned the same rectory to the bishop of the diocese to which the said rectory belonged, which bishop then accepted the said resignation thereof, he the said bishop having competent authority to accept the same; whereupon *390] and whereby the said rectory *became vacant: that the plaintiff was afterwards, in due form of law, presented, admitted, instituted, and inducted to the same rectory so void by the resignation of the defendant as aforesaid, and thereby became rector of the same parish church, and became and still continued seised, in right thereof, of and in the said chancel of the said parish church, and of and in the said houses, buildings, lands, and fences, and was the next successor of the defendant of and to the same rectory: Averment, that, at the time of the resignation of the defendant, the said chancel, houses, buildings, and fences were and still remained greatly dilapidated and out of repair, and in great decay for want of due repairing thereof, and were so left by the defendant when the said rectory so became vacant; and that the expenditure sufficient for the necessary repairing of the said chancel, houses, buildings, and fences, would amount to a large sum of money,—

of all which said premises the defendant afterwards, and after the plaintiff was so presented, admitted, instituted, and inducted as aforesaid, had notice, and was then requested by the plaintiff to pay for such necessary repairs as aforesaid, and a reasonable time for the defendant to pay for the same elapsed before this suit, and all things necessary happened to entitle the plaintiff to have the defendant pay for the same: Breach, that the defendant, contriving and fraudulently intending to injure the plaintiff in this behalf, had not yet paid the plaintiff for such necessary repairs, or for any part thereof, although often requested so to do, but had hitherto altogether neglected and refused, and still did neglect and refuse to pay him the same.

The second count was similar, charging the defendant as vicar of Newnham, in the county of Hertford.

The defendant pleaded,—first, to the first count, that *the chancel, houses, buildings, and fences in the first count men- [*391 tioned were not, nor was any part thereof, dilapidated, out of repair, or in decay, nor were they, nor was any part thereof, so left by the defendant as alleged.

Secondly, as to the first count, that the defendant had not such notice, and was not requested by the plaintiff, as therein alleged.

Thirdly, to the first count, that a reasonable time for the defendant to pay for the said repairs had not elapsed, as alleged.

Fourthly, to the second count, that the said houses, buildings, and fences in the second count mentioned were not, nor was any part thereof, dilapidated, out of repair, or in decay, nor were they, nor was any part thereof, so left by the defendant, as alleged.

Fifthly, to the second count, that the defendant had not notice, and was not requested, as in that count alleged.

Sixthly, to the second count, that a reasonable time for the defendant to pay for the repairs therein mentioned had not elapsed, as alleged.

Seventhly, that, whilst the defendant was rector of Caldecot and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of the Central London District School, and that the plaintiff and defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings in their then state and condition, and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them; that the exchange was afterwards, in pursuance of the said agreement, carried into effect; and that the plaintiff thus and not otherwise became successor of the defendant in the said rectory and vicarage as in the declaration mentioned.

*Eightly, as to the first count so far as it related to white- [*392 washing the said chancel, and as to the second count so far as it related to painting and whitewashing the buildings therein mentioned, that, whilst the defendant was rector of Caldecot and vicar of Newnham

as in the declaration mentioned, the plaintiff was chaplain of the Central London District School, and that the plaintiff and defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, which exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became successor of the defendant in the said rectory and vicarage as in the declaration mentioned: that the matters in the introductory part of this plea mentioned were part of the dilapidations and wants of repair for which this action was brought, and that, at the time of the said exchange, the defendant was lawfully possessed as of his own property of certain fixtures and effects in and upon the said vicarage, which the plaintiff was desirous of purchasing of the defendant, and that thereupon, in consideration that the defendant, at the request of the plaintiff, would sell and relinquish to the plaintiff the said fixtures and effects at a reduced price, the plaintiff agreed to accept the same at such reduced price in satisfaction and discharge of that part of the claim in the declaration mentioned as to which this plea was pleaded: that the defendant did, in pursuance of the said agreement, sell and relinquish to the plaintiff the said fixtures and effects, at such reduced price, and that the plaintiff then accepted the same in full satisfaction and discharge of the said part of the claim in the declaration mentioned.

Ninthly, that, before any or either of the said supposed breaches of duty in the declaration mentioned, the plaintiff otherwise than by either *898] of the agreements in the *preceding pleas mentioned, and not by deed, wholly and absolutely absolved, exonerated, and discharged the defendant from the payment of the said moneys, and every part thereof.

The plaintiff joined issue on the first, second, third, fourth, fifth, sixth, and last pleas.

As to the seventh plea,—the plaintiff admitted, that, whilst the defendant was rector of Caldecot and vicar of Newnham, the plaintiff was chaplain of the Central London District School, as therein alleged, and that the plaintiff and defendant, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, and that the exchange was afterwards, in pursuance of such agreement, carried into effect, and that the plaintiff thereby became the defendant's successor in the said rectory and vicarage as in the declaration mentioned; but the plaintiff joined issue on so much of the seventh plea as alleged that [it was agreed that] the plaintiff should not call on the defendant to pay for the repairs in the declaration mentioned, or any or either of them.

As to the eighth plea,—the plaintiff admitted, that, whilst the defendant was rector of Caldecot and vicar of Newnham, the plaintiff was chaplain of the Central London District School, as therein alleged, and

that the plaintiff and defendant, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings, and that the said exchange was afterwards, in pursuance of the said agreement, carried into effect, and that the plaintiff thus, and not otherwise, became the defendant's successor in the said rectory and vicarage, as in the declaration mentioned, and that the whitewashing of the said chancel, and the painting and whitewashing the buildings in the eighth plea referred to, were part of the dilapidations and wants of repair [*394 *for which this action was brought; but the plaintiff joined issue on the residue of the eighth plea.

The plaintiff also demurred to the seventh and ninth pleas,—to the seventh, on the ground that the alleged terms of the exchange were simoniacal and void,—and to the ninth, on the ground that, if the alleged exoneration was before the plaintiff was successor, he was not in a position to exonerate, and, if after, then that his right to be paid for dilapidations could not be discharged without deed or without a consideration, and that, as no consideration was stated, none could be implied.

The Court of Common Pleas, in Trinity Term, 1855,—a verdict having been found for the defendant on the issue joined on the seventh plea,—upon a motion for judgment non obstante veredicto, held that plea to be good, inasmuch as it did not *necessarily* disclose a simoniacal contract: see *Goldham v. Edwards*, 16 C. B. 437 (E. C. L. R. vol. 81). The demurrers coming on to be argued in the following term, that court held that they were bound to put the *same* construction upon the seventh plea in that stage of the proceeding, and accordingly gave judgment thereon for the defendant. (a) Upon the demurrer to the ninth plea, the plaintiff had judgment: vide 17 C. B. 141 (E. C. L. R. vol. 84).

The record now came before the Exchequer Chamber on writ of error; and the case was argued before Pollock, C. B., Alderson, B., Coleridge, J., Wightman, J., Erle, J., and Bramwell, B.

Unthank (with whom was *Montague Chambers*), for the plaintiff in error. (b)—It is material to consider in *this case whether, where [*395 a party avails himself of the power given by the 80th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, to plead and demur also, the old rule as to the construction of a plea when brought before the court on demurrer is not still to prevail. That rule is well explained by Wilde, C. J., in *Pilgrim v. The Southampton and Dorchester Railway Company*, 7 C. B. 205 (E. C. L. R. vol. 62), where he says,—“The plea comes before us upon general demurrer. It must therefore receive a fair and reasonable construction, and is not to be read so as to give to its language a strained construction in favour of the party pleading.” That excludes the strained construction put by the Court of

(a) The report inaccurately states that the *plaintiff* had judgment on the demurrer to the seventh plea.

(b) The ninth plea was given up.

Common Pleas upon this seventh plea upon the motion for judgment non obstante veredicto. [ALDERSON, B.—Are we bound to construe the same words differently on two parts of the record?] It may be so: but the question will hardly arise here. [BRAMWELL, B.—Show the seventh plea bad on demurrer, and I do not think you will have much difficulty upon the other point.] In *Gould v. Webb*, 4 Ellis & B. 933 (E. C. L. R. vol. 82), it having been suggested by the counsel in argument, that “the court will no longer act upon the principle that anything is to be presumed against the party pleading; it will rather seek so to interpret the plea as to raise a defence,”—Crompton, J., said, “I entirely dissent from the rule which Mr. Brown proposes for construing pleas: it is most important to have it understood that such a rule does not prevail. It is not now, any more than it was, enough that a plea should contain matter which may be so understood as to raise a defence. It is true that we are not now to require any particular formality of statement. But there must always be a statement of matters necessarily constituting an answer.” The familiar rules for the construction of pleas, as laid down *396] in *Com. Dig. Pleader*, *(E. 6), are still to be observed. It is submitted, that, construing this plea by those rules, it is clearly bad, inasmuch as the agreement it sets up necessarily involves simony. It seems to have been doubted whether simony was such an offence at common law as to afford an answer to a contract. The 5th section of the 81 Eliz. c. 6, enacts, “that, if any person or persons, bodies politic and corporate, shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction therefrom, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the Queen’s Majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year’s profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend,

*or living ecclesiastical." And the 8th section enacts, that, "if any incumbent of any benefice with cure of souls do or shall corruptly *resign or exchange* the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or *benefit whatsoever*, that then, as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had; the one moiety, as well thereof as of the forfeiture of double value of one year's profit before mentioned, to be to the Queen's Majesty, her heirs and successors, and the other moiety to him or them that will sue for the same, by action of debt," &c. *Cope v. Rowlands*, 2 M. & W. 157,† and that class of cases,^(a) show that a contract for the doing of a thing which is prohibited by statute, under a penalty, is illegal. [ALDERSON, B.—What is the *benefit* here?] The giving up the claim against the outgoing incumbent for the dilapidations of the parsonage-house and premises. Every incumbent is bound to keep the parsonage or vicarage-house and premises in repair, and to rebuild even though they be destroyed without any default on his part: *Sellers v. Lawrence*, Willes, 413. Here, each party would have a right to sue the other for dilapidations. In *Downes v. Craig*, 9 M. & W. 166,† two clergymen, being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party respectively was inducted into the other of them: there was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations: and the Court of *Exchequer held, in an action by one of the incumbents, as successor, against the other, for dilapidations, that the plaintiff was entitled to recover. Lord Abinger there said: "It might be a very considerable question, whether, if a contract for the exchange of livings were made in writing, with an express declaration that neither party should sue the other for the dilapidations,—if one party said, 'If you will admit me to your living, I will admit you to mine, and I will make no claim for dilapidations,'—it would not amount to a simoniacal contract, and so would be void." And Parke, B., said: "The case finds that there was no specific agreement, and it would be very wrong to infer from the facts stated in the case that there was such an agreement; and, even if there were, I cannot help concurring in the doubt which has been expressed by my Lord, whether it would be valid and binding. It appears to me to savour of simony." [BRAMWELL, B.—Were you not bound to show on the face of your plea that the agreement was unlawful?] The question is whether illegality does not *necessarily* appear on the face of the plea. It is submitted that it does. The court

(a) See them collected in *Abbot v. Rodgers*, 16 C. B. 288 (E. C. L. R. vol. 81), and in *Chappel v. Davidson*, ante, p. 194.

below assume that the whole of the circumstances are not set in the plea; and hence they conclude that it was consistent therewith that there was a contract between the parties not tainted with simony. [WIGHTMAN, J.—Suppose the dilapidations were valued on an exchange of livings, and each amounted to 100*l.*, might not the parties mutually agree not to call upon each other to repair?] That would be a void agreement. [ALDERSON, B.—The benefit contemplated by the statute must be, not an avoidance of litigation, but something of a pecuniary nature.] The chaplain of a district school would not be subject to dilapidations, like a rector, a vicar, or a perpetual curate. Giving up on his part a claim against the other party for dilapidations surely would *399] be conferring a pecuniary benefit. Further, the seventh *plea, it is submitted, is bad upon exactly the same ground as that on which the court below held the ninth plea to be bad. A cause of action being once vested in the plaintiff, it could only be released *by deed*. A right to arise in futuro cannot be released: Com. Dig. *Release*, (E. 1). This is an accord without satisfaction. [POLLOCK, C. B.—Why may not a man waive a right? Might not the outgoing incumbent give up a claim to emblements?] That would be accord and satisfaction. [COLRIDGE, J.—It is not an uncommon thing for an incoming incumbent to forbear to enforce his claim for dilapidations. POLLOCK, C. B.—The real question is whether or not the bargain is simoniacal.] That, no doubt, is the substantial question. [ERLE, J.—Do you find nothing upon the subject in the ecclesiastical writers?] Nothing. It not appearing that there were, or could be, any dilapidations on the other side, how can the court consistently assume that the dilapidations on both sides were equal?

T. Chambers (with whom was *Channell*, Serjt.), *contra*, was not called upon.

POLLOCK, C. B.—We are all of opinion that the judgment of the Court of Common Pleas in this case must be affirmed. We think there is no distinction in the mode of construing a plea, whether it comes before the court upon a motion for judgment non obstante veredicto, or upon a demurrer. In either case the plea is to receive a fair and reasonable construction: but, where there is ambiguity, the construction should be most strongly against the party pleading, inasmuch as it is incumbent on him to make it clear. Now, what is the seventh plea here? It is, that, whilst the defendant was rector of Caldecot and vicar of Newnham, as in the declaration mentioned, the plaintiff was chaplain of *400] the *Central London District School, and that the plaintiff and the defendant thereupon, with the consent of their respective patrons and diocesans, agreed to exchange their respective livings *in their then state and condition*, “and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them;” that the said exchange was afterwards, in

pursuance of the said agreement, carried into effect; and that the plaintiff thus, and not otherwise, became successor of the defendant in the said rectory and vicarage as in the declaration mentioned. In *Downes v. Craig*, 9 M. & W. 166,† the agreement which the defendant sought to set up as exonerating him from liability for dilapidations, was pleaded in similar terms, but omitting the words within turned commas. Issue being joined on that plea, the jury found there was no such agreement. The court did not say that that agreement, which is amplified by the language of this plea, if found by the jury to have been made, would necessarily have been a simoniacal and void agreement. Here, the jury found the reverse of what was found in *Downes v. Craig*: they found that there *was* such an agreement as alleged in the plea. It is true, Lord Abinger threw out a doubt whether if a contract for exchange of livings were made in writing, with an express declaration that neither party should sue the other for the dilapidations, it would not amount to a simoniacal contract, and so would be void,—a doubt in which Parke, B., and Rolfe, B., expressed their participation. But, upon consideration, we are all of opinion that such an agreement would by no means *necessarily* be simoniacal. Many reasons might be suggested,—and many were suggested when the case was before the court below,—why such an agreement should be the most fair and righteous agreement that could be made between the *parties. The dilapidations on either side might have been equivalent or nearly so, or they might have [*401 been so trifling and insignificant as to make it not worth while to incur the expense of a valuation on either side. If there were anything in the facts to make the agreement *necessarily* simoniacal, the plea should have so alleged. That, however, does not necessarily or in any way appear upon the face of the plea; and therefore we think the judgment of the Court of Common Pleas must be affirmed. Judgment affirmed.

END OF EASTER VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Trinity Term,

IN THE
NINETEENTH YEAR OF THE REIGN OF VICTORIA. 1868.

THE Judges who usually sat in Banco in this Term were:-

JERVIS, C. J.
CRESSWELL, J.

WILLIAMS, J.
WILLES, J.

MEMORANDA.

WILLIAM BALLANTINE, Esq., of the Inner Temple, and John Humffreys Parry, Esq., of the Middle Temple, having been called to the degree of the coif in the course of this Term, appeared at the Bar of the Court, and took their seats, after severally counting in a writ of dower unde nihil habet.(a)

They gave rings with the following mottos,—the former, “Jacta est alea,” the latter, “Spe et fide.”

(a) This ceremony is dispensed with where the party is called by writ issued in vacation.

***In the Matter of EDMUND GARBETT. May 22. [*403**

In the year 1847, A. was found guilty of *forgery*, but judgment was respited on the ground that the judge had received evidence which was inadmissible, viz. admissions which the prisoner had been compelled to make when under examination as a witness in an action in the Court of Queen's Bench; and he in consequence received a free pardon. In 1849, A. was struck off the roll for *perjury* in an affidavit of increase:—The court refused in 1856 to readmit him to the roll, although he produced very strong affidavits and testimonials as to his conduct since 1849.

In Michaelmas Term, 1849, Mr. Edmund Garbett, an attorney residing and carrying on business at Dawley, in the county of Salop, was struck off the roll of attorneys of this court, at the instance of the defendant in a cause of *Harcourt v. Dickson*, on the ground that he (Garbett), being the attorney in the cause, procured the plaintiff to make, and himself joined in making, an affidavit as to payments made to witnesses for their expenses, which he knew to be false. He was afterwards, at the instance of the Incorporated Law Society, struck off the roll of the other courts of common law, and also off the roll of the Court of Chancery. In Easter Term last,

Whately moved for a rule to show cause why Mr. Garbett should not be restored to the roll of this court. The application was founded upon an affidavit of Mr. Garbett, stating how he had supported himself and family since his removal from the roll, and that he had ever since conducted himself with strict honour and propriety, and professing to explain some of the grounds upon which the charge against him had rested,—fortified by affidavits and by memorials signed by a great many persons (to the number of about one hundred and fifty), consisting of magistrates, barristers, solicitors, merchants, and others, who professed some of them to have known him upwards of twenty-five years, and who testified to the general correctness of his conduct, and vouched him as being in their judgment a fit and proper person to be restored to the roll.

He submitted, that, however reprehensible or criminal the conduct of Mr. Garbett had been, the punishment *he had undergone, his [*404 subsequent good conduct, and the very satisfactory testimonials he now produced, should be considered sufficient to atone for and induce the court to pardon his offence; and that, for a single solitary act of misconduct, he ought not to be doomed to perpetual deprivation, or his wife and family reduced to beggary by his being shut out from the exercise of his professional talents. [CRESSWELL, J.—Was not this person convicted of forgery? I have a recollection that an attorney named Garbett was compelled by Lord Denman to answer certain questions which were put to him as a witness in a cause, and, upon his answers thereto, was committed for trial and convicted of forging an acceptance to a bill of exchange; and, upon argument before the Court of Criminal Appeal, the majority of the judges held that he had been improperly convicted, inasmuch as the confession of his guilt was unduly extorted from him; and he in consequence received a free pardon. That matter was not brought before the court when Mr. Garbett was struck off the

roll in Michaelmas Term, 1849, though it must have taken place at an earlier period.] It does not appear from the affidavits which are before the court, that the applicant is the same individual.

Hodgson, who was instructed by Mr. Maugham, the secretary of the Incorporated Law Society, to oppose the application, stated that he was instructed (though he had no affidavit of the fact), that the applicant *was* the person who was convicted and afterwards pardoned in the manner mentioned by Cresswell, J. [JERVIS, C. J.—I think we ought to have an affidavit of the fact; and I also think the society owes it to the court to explain why this matter was not brought before it on the motion for striking Mr. Garbett off the roll. The society has a duty to *405] perform towards the profession: but the court is not *to be bound by their exercise of discretion as to the manner in which that duty is to be performed. The rule must be enlarged until next term, in order that the necessary information may be afforded.]

Hodgson now produced an affidavit identifying Mr. Garbett, the applicant, as the person who was convicted of forgery, and stating that the conviction took place at the Central Criminal Court on the 15th of May, 1847 (as appeared by the certificate of the clerk of the arraigns), and stating the appeal, and the subsequent pardon.(a) He also produced an affidavit of Mr. Maugham, showing, that, in abstaining from bringing that conviction before the court at the time it took place, the council of the Incorporated Law Society acted upon the advice and opinion of their counsel, the late Mr. Fred. Robinson, who conceived, that, inasmuch as the court of appeal had decided the conviction to have been improper, and Mr. Garbett had received Her Majesty's pardon, it would not be right by a collateral proceeding to deprive him of the benefit of the court's judgment and the crown's clemency.(b)

(a) See the case reported in 2 Car. & K. 474 (E. C. L. R. vol. 61), 1 Den. C. C. 236.

(b) The opinion of Mr. Robinson was as follows:—

"The judgment having been respited, Garbett has not in point of law been convicted, though a verdict of guilty passed against him: it is the judgment of the court, following up the verdict of the jury, which constitutes the conviction. The consequence of this is, that Garbett cannot, I think, be proceeded against on either of the two grounds upon which the Court of Queen's Bench is accustomed to interfere in these cases,—that is, either as a person convict, or as a party accused and called upon to answer the charge by his affidavit. The Law Society rightly prefers the former course, where the facts admit of it, because it then becomes unnecessary to bring the special facts of the case forward on affidavit. But, as Garbett has not been convicted, and, if he had been, has been pardoned, I cannot think the proceedings against him at the Central Criminal Court can properly be made the foundation of any penal proceeding against him. The effect of the pardon is (as the old books lay it down), to make a 'new man' of the person, so far as even to cure the taint of blood as to afterborn offspring. On the other hand, if the society should move the court against Garbett on the ground, not of the conviction, but of his having in fact committed forgery, it does not appear that the society is in possession of such facts, to be verified by affidavit, as would make out the case against him, without calling in aid his own confession, made under circumstances open certainly to the same exception, and which no single court would, I think, be disposed to act upon, after the difference of opinion prevailing on the point in the highest criminal court of appeal. I think, therefore, that the society is not in a condition to make the motion with success.

"It is remarkable that there is a statute still unrepealed, by which an attorney practising after a conviction for forgery, is liable to be proceeded against summarily, and subjected to transportation. See 12 G. 1, c. 29, s. 4."

*The statute 12 G. 1, c. 29, s. 4, which is unrepealed, shows, that, in the opinion of the legislature, a person who is convicted of forgery or perjury is unfit to be permitted to practise as an attorney. That section, "for avoiding the great mischiefs and abuses which arise from infamous and wicked persons already convicted of wilful perjury or forgery practising as attorneys or solicitors in courts of law and equity," enacts, "that, if any person who hath been or who shall be convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury, or common barratry, shall act or practise as an attorney or solicitor or agent in any suit or action brought or to be brought in any court of law or equity within that part of Great Britain called England, the judge or judges of the court where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court; and if it shall appear to the satisfaction of such judge or judges that the person complained of, or against whom such information shall be given, hath offended *contrary to this act, such judge or judges shall cause such offender to be transported for seven years to some or one of His Majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported." The circumstance of Garbett's conviction not being sustained, in consequence of the reception by the learned judge who tried him of evidence which ought not to have been received, in no degree diminishes his moral guilt and infamy. The grounds upon which this court proceeded on the occasion which is now brought under review, appear from the judgment delivered by Wilde, C. J., on making the rule absolute, in which he says: "The charge made against Mr. Garbett was, that, upon a taxation of costs which took place in a cause of *Harcourt v. Dickson*, on the 28th of April, 1849, an affidavit was exhibited to the master, made by the plaintiff and by Mr. Garbett, in which affidavit the plaintiff swore that he had paid *and caused to be paid* certain payments specified to eleven witnesses whose names are stated in the affidavits; and the charge is, that the payments alleged in that affidavit to have been made, have since been discovered to be much smaller than those stated in the affidavit, and that in truth all that had been paid was paid by Mr. Garbett and his clerk, and it does not appear that the plaintiff made any one payment; and it is charged against Mr. Garbett that he caused this affidavit to be made and used, knowing it to be false, for the purpose of procuring an excessive allowance in respect of costs. The application is made on the affidavits of eight of the witnesses: two cannot be found, and one has refused to make an affidavit, stating as his reason that he does not choose to become a party to, or to be mixed up in, any proceeding against Mr. Garbett. Cause was shown against the rule on the affidavits of *Mr. Garbett, Mr. Wood (who had formerly been clerk to Mr. Garbett, and who gave Mr. Garbett assistance in

preparing this cause for trial, and who had various communications with the plaintiff), and Homfray and Phillips (two of the present clerks of Mr. Garbett), and Mr. Griffiths." And, after going minutely through the several affidavits filed in support of the motion, as well as those in answer, he observes,—“On the whole, it seems that Mr. Garbett had no reason to believe that the affidavit was true; but on the contrary, the presumption and inference from his conduct antecedent to the affidavit, is, when he makes the plaintiff say that he paid *or caused to be paid*, to withhold that security which the court requires for the safety of its suitors,—the oath of the party. Mr. Garbett swears to no payment: he is, therefore, safe in respect of any charge of that sort. The court expects an affidavit of increase of costs which shall give the security of an oath that the payments have in truth been made; and this affidavit withholds that security. The payments charged to have been made appear to be excessive; and, looking at all the facts that occur before taxation, it does not appear at all probable that Mr. Garbett expected that those payments were made. Look at his conduct afterwards, and see what the just inference from that conduct is. It is, that, knowing that he had procured the plaintiff to make a false affidavit, he sought to provide himself with a document which would be calculated to impose on the court the belief that the plaintiff had made those payments: the receipts, therefore, are all ante-dated. It seems to, me,—and my Brothers Coltman, Maule, and Cresswell, who have read and considered the affidavits with as much anxiety as I have done, and agree in the conclusion at which I have arrived,—that the charge is established, that Mr. Garbett made use of an affidavit which was false, and false to his own knowledge, for the purpose of imposing

*409] *upon the officer of the court. Where such a charge is established, considering the difficulty and the trouble of an investigation, after taxation, into the truth of an affidavit of increase, the great opportunities that may occur for imposition, and its ruinous results, looking to the facility with which such a fraud can be committed, the difficulties of its detection, and the consequences to the parties, the court has but one duty to discharge, and that is, not to permit a man having a disposition to commit a fraud of that description to profit by his position as an officer of the court. It is the imperative duty of the court to protect the public by the removal of such a person from the roll. We are therefore of opinion that the rule should be made absolute.” The simple question for the court to decide is, whether one who has been convicted of *perjury* and *subornation of perjury*, and who by his own admission has been *guilty of forgery*, is a fit and proper person to be permitted to exercise the important and responsible functions of an attorney. [JERVIS, C. J.—Mr. *Whateley* says Mr. Garbett has sufficiently expiated his offence by seven years' suspension; and that his subsequent conduct has been blameless.] The removal of an attorney

from the roll, or refusal to readmit him, is not in the nature of punishment,—*Stephens v. Hill*, 10 M. & W. 28,† 1 Dowl. N. S. 669,—but for the purpose of withholding from him the power to work mischief. The question is, whether the court can see any satisfactory reason for the readmission of such a person as Mr. Garbett is shown and admitted to be. In *Ex parte Brounsall*, 2 Cowp. 829, an application having been made to strike Brounsall off the roll of attorneys of the Court of King's Bench, he having been convicted of stealing a guinea, for which offence he received sentence to be branded in the hand, and to be confined in the house of correction nine months,—the Solicitor-General showed cause, *urging that the conviction took place five years ago, since which time no misconduct whatever could be imputed to the party: [*410 that, having received the benefit of clergy, and having been branded in the hand, it operated as a statutable pardon, and therefore to comply with the application would be to punish Brounsall a second time for the same offence,—citing *Serle v. Williams*, Hob. 288, where it was held that a clergyman could not be deprived for a felony for which he had received the benefit of clergy. But Lord Mansfield said,—“This application is not in the nature of a second trial or a new punishment. But the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of peace, the conviction itself would not remove him from the commission: but, could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But, as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges.” And, on a subsequent day, his Lordship said: “We have consulted all the judges upon this case, and they are unanimously of opinion that the defendant's having been burnt in the hand is no objection to his being struck off the roll. And it is on this principle that he is an unfit person to practise as an attorney. It is not by way of punishment: but the court in such cases exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney.”

Dowdeswell (with whom was *Whateley*), in support of *the rule. [*411 —Mr. Garbett's application to be restored to the exercise of his profession ought not to be affected by his conviction upon the charge of forgery, which conviction was obtained by the extortion of an admission from him under a threat of imprisonment. The court of appeal very properly decided that evidence thus obtained was not to be relied on: and, the conviction having been quashed, and a free pardon granted, such conviction ought to be considered as having never taken place; and, as it could not with propriety have been made the foundation of an

application to strike him off the roll, so it ought not to be now urged as a ground for refusing to readmit him. As to the rest, taking into consideration Mr. Garbett's conduct since the rule in question was pronounced, and the satisfactory testimonials given to him by so many persons of respectability and position, and, considering the amount of punishment he has already undergone, it is submitted that he has made ample reparation and atonement to society, to the profession, and to the court, for the offence of which he admits himself to have been guilty, and from the consequences of which he ventures to hope that his penitence may induce the court to relieve him. [JERVIS, C. J.—Those who testify so strongly in Mr. Garbett's favour, and who profess to have known him for a long series of years, could not have known him very well, seeing that they were ignorant (for, so we must suppose them to have been) of so remarkable a passage in his life as his conviction for forgery !] It may well be that that fact had not come to their knowledge. Besides, most of them speak only as to Mr. Garbett's conduct since the year 1849. In *The King v. Greenwood*, 1 W. Bla. 222, where an attorney had been two years before struck off the roll for malpractice, the court say,—“The striking off the roll is not to be understood *412] as a perpetual disability, but is sometimes only meant as a *punishment, and may be considered in the light of a suspension only, if the court sees cause.” And in *Vaughan's case*, and *Fortune's case*, two years' suspension was considered to be a sufficient punishment to be inflicted upon attorneys who had been guilty of perjury.

JERVIS, C. J.—I am of opinion that there is no pretence for this application. It is not now sought to strike Mr. Garbett off the roll of attorneys of this court, or to suspend him from practising as an attorney, for any alleged malpractice or misconduct. But the question is, whether, he having already been removed from the roll for an offence of the most grave and serious character, we ought to be called upon to restore him, and so to invest him with a power and authority which in my opinion would make him a most dangerous individual. It appears, that, in the year 1847, he was tried and found guilty of forgery, and that he afterwards received a free pardon, because a portion of the evidence which led to his conviction consisted of admissions made by him under circumstances, that, in the opinion of the court of appeal, rendered them legally inadmissible. But, notwithstanding that conviction was quashed, and notwithstanding the pardon accorded to him in consequence, there was abundant evidence to show that Garbett really was guilty of the crime laid to his charge. Are we, under these circumstances, now to say that this person is one to whom we can safely and properly give authority to practise as an attorney of this court? We start with the knowledge, derived from the best possible source, viz. his own confession, that he has been guilty of forgery: and this court has adjudged him guilty of perjury and subornation of perjury for the fraudulent purpose of putting

into his own pocket money to which he was not justly entitled. This, therefore, is an application for re-admission of a person confessedly *guilty of forgery, and adjudged to be guilty of perjury; and the main ground of the application is, that he has already, by being [413 seven years off the roll, suffered punishment enough for his delinquency. It seems to me that we should be guilty of the greatest possible dereliction of our duty, if we were to readmit a man so tainted with crimes which of all others are the most calculated to engender suspicion and distrust. Another ground upon which we have been strongly, almost pathetically, urged to deal mercifully with Mr. Garbett, is, that he has a wife and family dependent upon him for support, and that these will be the principal sufferers from the failure of this motion. That, undoubtedly, is a circumstance which we cannot but regard with the deepest commiseration and regret. But, at the same time, it must be observed that a wife and family have always been considered as guarantees to society that a man will conduct himself with honour and integrity in his dealings with the world: and we must not lose sight of the fact, that, in permitting ourselves to be influenced by considerations of that sort to extend mercy to Mr. Garbett, we should be running the risk of doing the greatest possible injury and injustice to the public. Upon the whole, giving its due weight to all that has been urged on his behalf, I think I should be almost as criminal as the applicant himself if I were to yield to this application. The rule must be discharged.

WILLIAMS, J.—I am entirely of the same opinion. We are asked to readmit as an attorney on the roll of this court a person who it is conceded was deservedly removed from it for one of the greatest offences of which as an officer of the court he could be guilty. I think we could not with decency do such an act of grace, even if the offence for which Mr. Garbett was struck off the roll was the only offence of which he had been *guilty. But we are also asked to shut our eyes to the fact that this man had previously been guilty of forgery. Now, it is [414 clear to my mind that Mr. Garbett was convicted of forgery upon evidence which ought not to have been received, and therefore that that conviction was properly quashed. But it is equally clear that he was *guilty* of that crime. I, therefore, agree with my Lord in thinking that we should be guilty of a very gross dereliction of our duty, if, by replacing this man upon the roll of attorneys, we were to put him in a position to exert his talents to the possible detriment of the public.

WILLES, J., concurring,

Rule discharged.

**THE CORK AND YOUGHAL RAILWAY COMPANY v.
PATERSON. June 6.**

Two companies proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees, or directors "to demise or sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways," &c. In pursuance of the powers thus conferred upon them, the directors of the two companies agreed to amalgamate and to form one united company, and this agreement was carried into effect by resolutions made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company:—

Held, that the power to amalgamate was vested in the two boards, and that those powers were well and effectively exercised; and that the company so united or amalgamated might maintain an action for calls against a shareholder of either company who had executed the parliamentary contract and subscribers' agreement.

THIS was an action of debt brought by the plaintiffs to recover the sum of 100*l.* and interest from the 10th of October, 1854.†

The plaintiffs are incorporated by "The Cork and Waterford Railway Act, 1846," 9 & 10 Vict. c. cccxcvii., "The Cork and Waterford Railway Amendment Act, 1851," 14 & 15 Vict. c. xcv., and "The Cork and Youghal Railway Act, 1854," 17 & 18 Vict. c. ccvi.: and those *415] "acts in the usual way embody the provisions of the three general railway acts, viz. "The Companies Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 16, "The Lands Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 18, and "The Railways Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 20; all which acts were to be referred to as part of the case.

By the particulars of demand endorsed upon the writ of summons issued in this action, the plaintiffs claimed 100*l.*, for a first call of 1*l.* per share made by the company upon the defendant in respect of one hundred shares of which he was the holder, payable on the 10th of October, 1854, with interest from that day to the day of payment.

By consent of the parties, and by a judge's order, the following case was stated for the opinion of the court, without pleadings, under the provisions of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 42.

In the year 1845, the Cork and Waterford Railway Company, and the Cork, Midleton, and Youghal Railway Company (proposed to run in part through the same district), were respectively provisionally registered under the 7 & 8 Vict. c. 110. Both companies were projected for the purpose of making the lines of railway mentioned in their respective subscription deeds, and contemplated an application to parliament for the necessary powers in the session of 1846.

The subscription deeds of the Cork and Waterford Railway Company consisted of the usual subscription contract and subscribers' agreement.

The subscription contract, which was made on the 5th of May, 1845, between the several persons whose names and seals were respectively

subscribed and affixed in the schedule thereunder written of the first part, and John Surrage and Augustus Mason (trustees named and appointed for the purpose of enforcing and giving effect to the covenants and matters thereafter contained), of *the second part,—witnessed, that each and every of them the said several persons [*416 parties thereto of the first part, for himself and herself respectively, and for his and her heirs, &c., but so as to be liable to the extent only of the sum or amount of money set opposite to his or her name in the said schedule thereto, and not further or otherwise, did thereby covenant, promise, and agree with and to Surrage and Mason, their executors, &c., in manner following, that is to say, that each and every of them the said several persons parties thereto of the first part (together with the several other persons who had set their names and affixed their seals, or who might set their names and affix their seals, to two certain other indentures respectively bearing even date, and of the same tenor, purport, and effect with those presents), had subscribed the sum set opposite to his or her name in the said schedule thereto, for the purpose of making and establishing a railway from a point or points at or near Patrick's Bridge, in the city of Cork, in Ireland, to a point or points in or near to the city of Waterford, with branches from the main line of the said intended railway to a point or points at or near Cove, in the county of Cork, and with all proper approaches, depots, stations, wharfs, works, and conveniences connected with such railway,—the said railway to be called "The Cork and Waterford Railway," or by such other name or names as might at any time thereafter be adopted by the committee or directors engaged in promoting the establishment of the undertaking thereby contemplated, and with full power for the said committee or directors from time to time to determine upon and fix, as well the sites or spots at which the said intended railway, or any branch or branches therefrom, and other works connected therewith, should commence, as also the sites or spots at which the same respectively should terminate, and the intermediate courses, routes, or lines thereof *respectively, and also from time to time to alter and vary the [*417 same sites, spots, courses, routes, or lines respectively, and also to demise or sell the said intended railway, or any part thereof, and also to concur in and sanction an amalgamation of the said intended railway, or any part thereof, with any other railway or railways, existing or projected, and to purchase or take a lease or leases of any other railway or railways, and to abandon any part or parts of the said undertakings, and also to make applications to parliament in the next session for an act or acts for all or any of the purposes aforesaid, or to confine the applications in the next session to any portion of the said undertaking, as the said committee or directors should think fit, and also to make or renew in any future session or sessions any application or applications for an act or acts for all or any of the purposes aforesaid: and the in-

denture further witnessed that each and every of them the said several persons parties thereto of the first part, for himself and herself, and his and her heirs, &c., and as concerning himself and herself only, and his and her own acts, deeds, and defaults respectively, did thereby covenant, promise, and agree with and to Surrage and Mason, their executors, &c., that each and every of them the said several persons parties thereto of the first part, his or her heirs, &c., should and would well and truly pay or cause to be paid the amount subscribed by him or her, or such part thereof as should not have been paid by him or her at the date of his or her signature to those presents, within three years from the date thereof, in such sums and at such places and times as should be required by any act or acts of parliament to be applied for as aforesaid, or as the directors or others authorized by the said act or acts should lawfully direct or appoint.

The subscribers' agreement, which was made on the same 5th of May, 1845, between the several persons *whose names were subscribed
 *418] and seals affixed in the schedule thereto of the first part, and John Surrage and Augustus Mason (trustees named and appointed for the purpose of enforcing and giving effect to the covenants thereafter contained, of the second part,—witnessed, that each of them the said several persons parties thereto of the first part, did thereby, for himself and herself, and his and her heirs, &c., and so far only as related to his and her own acts, deeds, and defaults, but not otherwise, covenant, promise, and agree with and to the said Surrage and Mason, their executors, &c., in manner following, that is to say, that each and every of them the said several persons parties thereto of the first part (together with the several other persons who had set their names and affixed their seals, or who might set their names and affix their seals to two certain other indentures respectively bearing even date, and of the same tenor, purport, and effect with those presents) had subscribed, and did thereby subscribe, the sum set opposite to his or her name in the said schedule thereto, for the purpose of making, establishing, and maintaining a railway, with all proper works and conveniences connected therewith, to be called "The Cork and Waterford Railway," or by such other name or names as might at any time or times be adopted by the managing committee or directors for the time being of such intended railway,—the said railway to commence at a point or points at or near Patrick's Bridge, in the city of Cork, and to terminate in or near to the city of Waterford, with branches from the main line of the said intended railway to a point or points at or near Cove, in the county of Cork, and to a point or points at or near Fermoy, in the said county of Cork, and with such branch or branches as the said committee or directors may from time to time determine upon: that the said several persons parties thereto of the first part did, and
 *419] *each and every of them did thereby recognise and acknowledge, nominate, appoint, and declare certain persons (naming them) as

the managing committee or directors of the said undertaking, for the purposes, and with the powers therein declared and contained: That each and every of them the said persons parties thereto of the first part did thereby, for himself and herself, and his and her heirs, &c., and so far only as related to his and her own acts, deeds, and defaults, further covenant, promise, and agree with and to the said Surrage and Mason, their executors, &c., in manner following, that is to say, that they the said several persons parties thereto of the first part, and their several and respective heirs, &c., shall and will faithfully observe, perform, and abide by the several stipulations, rules, and regulations thereafter mentioned, that is to say (amongst others), That a deposit of 1l. 10s. per share shall be paid by each subscriber on the number of shares subscribed for by him or her at the time of or previously to the signing of these presents, &c.: That the said committee or directors shall keep a minute-book, in which shall be recorded all their proceedings; and the minutes of every meeting of the said committee or directors shall be signed by the chairman or other member presiding at such meeting; and the minutes so signed, shall, upon proof of the signature thereto, be conclusive evidence of the several proceedings therein mentioned, in all actions, suits, or disputes between the subscribers to the said undertaking: That the said committee or directors shall have full power to take such measures as they may deem expedient to carry the aforesaid undertaking into effect, and for that purpose to cause such surveys and estimates to be made as they may think advisable, besides such as have already been made; and, for all or any of the purposes aforesaid, and for examining or testing the correctness of the plans, *estimates, [*420 and calculations of the promoters of any competing or other line or lines of railway, or of any parties opposing the said undertaking, or any part or parts thereof, that the said committee or directors shall have full power to retain, engage, appoint, remove, reappoint, and employ bankers, counsel, &c.; and also that the said committee or directors shall have full power to enter into, make, and execute all such contracts, agreements, and arrangements with landowners, railway or other companies, corporations, and promoters or proprietors of other schemes or undertakings, as they should think proper, and also to demise or sell the said undertaking, or any part thereof, or to *amalgamate the same, or any part thereof, with any other railway or railways*, and to purchase or take a lease or leases of any other railway or railways, and also to abandon the said undertaking, or any part thereof, and also to make application to parliament in the ensuing session for an act or acts for all or any of the purposes aforesaid, and to renew (if necessary) such application in any subsequent session or sessions, and also to introduce or to consent to the introduction in any act or acts of parliament for which application may be made as aforesaid, of any such special or other clauses and provisions as to the said committee or directors might

seem proper and desirable, and to take such proceedings in parliament or elsewhere as they might deem expedient for the purpose of opposing or altering the provisions of any bill or bills that might be solicited for the establishment of any railway or other work or undertaking which might in their judgment interfere with or tend to impede or defeat the accomplishment of the said undertaking, or to affect its interests, and also to fix upon and from time to time alter or vary the termini, route, course, or line of the said railway, and the sites or spots, or the stations, depots, and works connected therewith, and to determine whether and *421] how far, and to what extent, the said undertaking should be carried into effect and deferred or abandoned, and in like manner what branches, if any, from the main railway should form a part of the said undertaking; and, in case any act to be obtained in relation to the said undertaking should authorize the construction of a part or parts thereof, that the said committee or directors should have power to make or support in any subsequent session or sessions such application or applications to parliament as they might deem advisable for the construction of the remainder of the undertaking, or any part or parts thereof; and, generally, to enter into, make, and carry on such negotiations, arrangements, provisions, covenants, and agreements, and to do and execute all such acts, deeds, matters, and things in relation to the said undertaking, and to the application or applications to be made to parliament as aforesaid, and for winding up the said undertaking, and the affairs and concerns thereof, in case such act or acts of parliament should not be obtained as aforesaid, as they the said committee or directors should from time to time consider expedient: That the said committee or directors should have full power to call for payment from each subscriber to the said undertaking of any further sum or sums not exceeding in the whole (including the aforesaid deposit of 1*l.* 10*s.* per share) the sum of 2*l.* 10*s.* per share: That, in the act or acts to be obtained as aforesaid it should be provided that no call should be made upon the subscribers to the said undertaking, or any of them, which should exceed the sum of 5*l.* per share at any one time, and also that no more than four calls should be made in any one year, and that there should be an interval of three months between every two calls, and also that interest after the rate of 4*l.* per cent. per annum should be paid upon the amount paid by each subscriber in respect of his share, to be calculated from *422] the time or times of payment thereof, and also that the several subscribers, and their heirs, &c., should not be liable in any event for any larger sum than the sum set and subscribed opposite to their respective names as aforesaid: That the resolutions, instructions, or powers passed or given to the said committee or directors at any such general meeting as aforesaid, on the special subject for which such meeting should have been called and advertised, should be considered as the act of all the subscribers to the said undertaking, whether present

or absent, and should be binding on them accordingly: That, in the event of such act or acts as aforesaid being obtained, and of the aforesaid sum of 2l. 10s. per share proving insufficient for the purposes of paying and satisfying such costs, charges, expenses, and liabilities as should or might be or have been incurred as aforesaid in or about the said undertaking, each of the said several persons parties thereto of the first part, and their several and respective heirs, &c., should and would well and truly bear, pay, allow, and discharge the deficiency rateably and in proportion to their respective number of shares, in such way and manner, and at such time or times, as should be determined on and directed by a general meeting of the subscribers to the said undertaking, to be called by the said committee or directors for the purpose, in manner aforesaid.

These deeds were respectively executed by all the subscribers to The Cork and Waterford Railway Company; but neither of them was ever executed by the defendant, nor was he a subscriber to the undertaking therein referred to.

The subscription deeds of the Cork, Midleton, and Youghal Railway Company also consisted of a subscription contract and subscribers' agreement.

The parliamentary or subscription contract, which was made on the 13th of June, 1845, between the several *persons whose names [423] were thereunto subscribed and seals affixed of the one part, and Edmund Pontifex and James Wood of the other part, witnessed that each of them the several persons parties thereto of the first part, together with the persons who had subscribed their names and affixed their seals, or who might subscribe their names and affix their seals, to certain other indentures of the same date, tenor, purport, and effect therewith, and in which said indenture reference was made to that indenture, did for himself and herself, and for his and her heirs, executors, and administrators, and to the extent only of the sum of money set opposite to his or her name in the schedule thereunder written, under the column headed "amount of subscription," covenant, promise, and agree with and to the several other parties thereto, and every of them, separately, and with and to the said E. Pontifex and J. Wood as trustees for all the parties interested in the covenants therein contained or referred to, their executors, &c., in manner following, that is to say, That the said several parties thereto of the first part had respectively subscribed, and should and would within the time in that behalf thereafter mentioned pay, the several sums set opposite to their respective names in the said last-mentioned schedule, towards and for the purpose of making and establishing a railway, with all proper works, conveniences, buildings, and approaches connected therewith, and for working and carrying on the same, to be called the Cork, Midleton, and Youghal Railway, with branches to Cove and Fermoy, or by such other name or names as might

at any time thereafter be adopted by the committee of management or directors engaged in promoting the establishment of such railway, the same to commence at or near Penrose's Quay, in the borough of Cork, from thence proceeding through or near the villages of New Glanmire *424] and Carrigtwohill, the towns *of Middleton, Castlemartyr, and Killeagh, and terminating at the town of Youghal, and with branches to Cove and Fermoy, but with full power to the committee or directors aforesaid to alter from time to time the commencement, termination, and intermediate course of the said railway, or to abandon any portion thereof, and to make all such extensions thereof and branches therefrom, and works connected therewith, and also to provide all such means of working and conducting the same, as to such committee or directors should seem fit; which said railway and works were proposed to be constructed and governed under the authority of an act of parliament, to be applied for in the next session of parliament, with all usual and proper clauses and powers to be inserted in the said act for incorporating a company for carrying into effect the objects aforesaid, or any of them; and that they the said several persons parties thereto of the first part respectively, or their respective heirs, &c., should and would well and truly pay or cause to be paid the amount subscribed by each of them respectively as aforesaid for the purposes of the said act so intended to be applied for, within two years from the date thereof, in such sums and at such places and times as the said directors or committee of management, or other person or persons in that behalf authorized by such intended act should lawfully direct or appoint.

The subscribers' agreement of the Cork, Middleton, and Youghal Railway Company was dated the 18th of June, 1845. Its material provisions were as follows:—The several persons who thereunto subscribed their names and affixed their seals did thereby declare and agree each and every of them, for himself and herself, his and her heirs, &c., and so far only as related to his, her, or their own acts, to and with the others and every other of them, their, his, and her executors, &c., and *425] also to and with E. Pontifex and J. Wood, their executors, &c., as *trustees for all the other parties thereto, that they respectively had subscribed and would pay the several sums of money set opposite to their respective names in the schedule thereunder written in the column headed "Amount of subscription;" in respect of the number of shares of 50*l.* each also set opposite to their respective names in another column in the same schedule headed "Number of shares," to be applied with the subscriptions of the other parties who had executed or would execute other articles of agreement of the same purport or effect therewith, to the making of a railway from Cork to Youghal, by way of Middleton, with branches to Cove and to Fermoy, which undertaking was then described as The Cork, Middleton, and Youghal Railway, but that the provisional directors or committee for managing the said undertaking

were to have full power to vary, contract, or extend the purposes as then contemplated of the said undertaking, and particularly to determine and change the termini of the said railway and branches, and to make the whole of the said works, or such parts as they should find to be practicable and advantageous, and to make such other branches and communications to or from the same works respectively, and such extensions thereof, and such works connected therewith, as they should from time to time think expedient, and to make any arrangements they should deem expedient with any other companies relating to the said undertaking, *whether with respect to any amalgamation thereof with any other undertaking or works, or to any participation therein, respectively, or otherwise, as they should think fit*; and that those articles, and the moneys subscribed by them respectively, should be applicable to all the works to be undertaken in pursuance of the foregoing authorities, as effectually as if such works had been then originally contemplated: That certain persons named should be the provisional directors of the said undertaking until an act *or acts of parliament should be obtained for authorizing and regulating the same: That all the [*426 works before referred to, or such parts thereof as it should be determined to execute, were to be made, and the company of proprietors of the said undertaking was to be constituted by an act or acts of parliament to be applied for in the next, or, if occasion should be, in any subsequent session of parliament; and that, in the mean time, the provisional directors should have full power to adopt and carry into effect all such measures as they should consider conducive to the constitution and advancement of the said undertaking, and to the procurement of such act or acts, and specifically to cause such surveys, plans, estimates, and other documents to be made, deposited, and proved, and to enter into such provisional or other contracts with landowners, engineers, and others, and to do and direct to be done all such acts as should be deemed by them proper for the purposes aforesaid, or any of them; and that all the moneys paid and to be paid by the said subscribers on account of their subscriptions as aforesaid, should be applicable rateably by or according to the orders of the said directors, in payment of all expenses incidental to the purposes aforesaid or otherwise to the promotion of the said undertaking, and whether already incurred or thereafter to be incurred, in such manner as they should think most conducive to the advantage thereof: And that the subscribers should in no case be required to pay any sums exceeding the amount of their respective subscriptions; and that no further call should be made on account of the said subscriptions until such act or acts of parliament should have been obtained for the constitution and government of the said undertaking; and it should be provided thereby that no subsequent call should exceed the sum of 10*l.* per share, and that no calls should be made but with an interval of at least two months between the same.

*427] *The last-mentioned deeds were respectively executed by the subscribers to the Cork, Midleton, and Youghal Railway Company, in which capacity they were executed by the defendant in respect of fifty shares in the projected railway therein referred to. In the schedule to such last-mentioned deeds respectively the signature of the defendant appeared as a subscriber to the amount of 2500*l.*, of which amount 137*l.* 10*s.* had been paid up.

The defendant duly paid up the sum of 2*l.* 15*s.* upon each of the fifty shares so subscribed for by him in the said Cork, Midleton, and Youghal Railway Company, amounting to the sum of 137*l.* 10*s.* set against his name in the said schedule, as "Amount paid up."

The directors of the respective companies mentioned in the foregoing subscription deeds respectively had the management of their respective companies, and held board meetings from time to time; their proceedings in such capacity being entered in minute-books by the respective secretaries of such companies.

Extracts from the minute-book of the Cork and Waterford Railway Company, so far as they were material to the matters in issue, accompanied the case, and were to be referred to as part thereof. Similar extracts from the Cork, Midleton, and Youghal Railway Company also accompanied the case, and were to be referred to as part thereof. These extracts, so far as they were material, were as follows:—

An amalgamation of The Cork and Waterford and The Cork, Midleton, and Youghal railway companies having been proposed, at a meeting of the committee of the former, and a deputation from the committee of the latter company, the following resolutions were, on the 20th November, 1845, adopted as to the preliminary arrangements for amalgamating,—“1. That the said companies be amalgamated on the terms after mentioned. 2. That each company do bear and pay its own

*428] *liabilities up to the 30th instant out of their respective funds. 3. That, until an act or acts for making the line or lines of railway contemplated by the said companies, or either of them, shall be obtained, and the time be arrived for appointing a board of directors by the shareholders, the affairs of the united company shall be conducted by a provisional directory or committee of management consisting of sixteen shareholders qualified to be directors, of whom eight shall be appointed by the existing provisional directory of each of the said companies, three of each to be resident in Ireland. 4. That, so soon as these appointments shall be made by each of the said companies, and a meeting of the united company held, all officers of the two companies, paid or unpaid, shall be considered to have retired, until the united committee or provisional directory shall make new appointments, for which the present officers are eligible. 5. That the name to be given to the united company, the particular mode in which the two companies, and the shareholders therein respectively, shall be associated, the precise amount

at which the aggregate capital shall be fixed, the number, denominations, and value of the shares, and the distribution thereof, and the mode in which the united company shall proceed for the obtaining of its act or acts, be left to the consideration and decision of the committee of management of the united company. 6. That, if no insurmountable difficulties shall present themselves, it be agreed that the amalgamated company shall make application to parliament in the ensuing session for the whole line from Cork to Waterford, with its accompanying branches. 7. That, as difficulties may intervene from the standing orders of the Lords now requiring the deposit of 10 per cent., and it is desirable to provide against them, the engineers of both companies be requested to state, after receiving a report on the financial position of the amalgamated company under such *circumstances, what portion of the line ought to be applied for to parliament, holding in [*429 view the understanding of commencing at the two extremities."

The above terms of amalgamation were adopted and agreed to at meetings of the respective boards of the two companies, and an indenture of agreement, dated the 23d of January, 1846, between the provisional directors of the Cork and Waterford Railway Company and the provisional directors of the Cork, Midleton, and Youghal Railway Company, was duly executed by all parties.

This deed,—which was made between the provisional directors of the Cork and Waterford Railway Company of the first part, the provisional directors of the Cork, Midleton, and Youghal Railway Company of the second part, Surrage and Pontifex (trustees named and appointed for the purpose of enforcing and giving effect to the covenants and matters thereafter contained) of the third part, and Surrage, Mason, Pontifex, and Wood, of the fourth part,—recited the indentures of the 5th of May and 13th of June, 1845, the terms of amalgamation agreed to on the 20th of November, 1845, and that the capital of the proposed Cork and Waterford Railway Company was divided into shares of the nominal value of 25*l.* each, and the sum of 30*s.* each had been paid on such of the said shares as had been allotted; and that the capital of the proposed Cork, Midleton, and Youghal Railway Company was divided into shares of the nominal value of 50*l.* each, and the sum of 2*l.* 15*s.* each had been paid on such of the said shares as had been allotted; it was witnessed that the parties of the first and second part respectively covenanted with the trustees Surrage and Pontifex, that they, or the companies which they respectively represented, would, as well before as after such companies respectively, or either of them, should be established by law, perform and fulfil the agreements, &c., thereafter *expressed, so far as the same respectively ought to be per- [*430 formed, &c., by them respectively. It then proceeded to provide, amongst other things, "that the undertakings of the promoters of the Cork and Waterford Railway Company, and of the promoters of the

Cork, Midleton, and Youghal Railway Company, *should thenceforth be considered to be, and, as far as the parties thereto of the first and second parts could declare the same, were thereby declared to be, united into one concern and undertaking*: That such of the proposals of the 20th of November last as were not thereafter expressed and again agreed to, or as were inconsistent with the agreements and provisions thereafter contained, should be and were thereby declared to be rescinded: That the provisional directors of each of the aforesaid undertakings should individually as well as jointly endeavour to obtain either in the session of 1846, or in some future session of parliament, such act or acts as should be deemed expedient, and as the legislature should think proper, for establishing a company to consist of the promoters of and subscribers to the aforesaid proposed Cork and Waterford Railway Company and the promoters of and subscribers to the proposed Cork, Midleton, and Youghal Railway Company, and for enabling the company so to be established to make and maintain a railway or railways, with such branches, works, and conveniences, in such line or lines, and from and to such place and places as were described and set forth in the plans and sections prepared and deposited by the committee of management of the said Cork and Waterford Company: That, until such act or acts as aforesaid should be obtained, the provisional directors of the said two original proposed companies should respectively and also jointly promote as far as practicable, and under the direction of the provisional directors acting under those presents, the passing of such act or acts for *431] the purpose aforesaid, as such provisional directors should deem expedient: That the respective agreements thereinbefore recited should continue in force, both with respect to calls on the subscribers thereto, and for all other purposes consistent with those presents therein expressed, and should be put in force under the direction and by the authority of the directors thereafter appointed, when and as they should deem it expedient to direct the enforcement thereof, and the trustees of the said agreements should enforce the same respectively, when thereunto required by the directors acting under those presents," &c. The indenture further provided "that the directors appointed as thereafter mentioned, should, as soon as practicable after the execution of those presents, ascertain the respective interests of the respective subscribers to the Cork and Waterford Railway, and the Cork, Midleton, and Youghal Railway, in the said undertakings, and, for the purposes of those presents, regard being had to the respective nominal amounts of such shares, and the respective sums which should have been paid thereon, should ascertain and declare the shares to which the individual subscribers to the said several undertakings should be respectively entitled in the joint undertaking, the shares in the joint undertaking being deemed and taken as of the nominal amount of 25*l*. each, and should, if they deemed it expedient so to do, issue scrip-certificates accordingly to the

proprietors, and, with respect to proprietors of scrip-certificates of shares in the said several undertakings, in exchange for the same; and, inasmuch as the capital of the proposed Cork and Waterford Railway Company was considered to be divided into shares of 25*l.* each, on so many of which as had been allotted the sum of 80*s.* per share had been paid up, and the capital of the proposed Cork, Midleton, and Youghal Railway Company was considered as divided into shares of 50*l.* *each, [*432 on so many of which as had been allotted the sum of 2*l.* 15*s.* per share had been paid up,—the respective nominal amounts of the said several shares, and the respective sums paid on each share, should be taken into consideration in ascertaining the respective interests of the shareholders, and equalized; and, until new shares should be issued as aforesaid, the respective proprietors of nominal shares in the said two proposed companies should be deemed to be shareholders according to the amount thereof and of the sums paid thereon respectively in the proposed united company, and as subscribers to the undertaking for or in respect to which an act or acts of parliament should be applied for or obtained.” It then proceeded to appoint directors of the amalgamated company, and to provide for meetings, &c., &c.

The following circular notice of the amalgamation was sent to the subscribers of the Cork and Youghal Railway Company; but there was no evidence that such notice was received by the defendant:—

“Cork, Midleton, and Youghal Railway Company.

“The provisional directors of the above railway (in exercise of the powers conferred on them by the parliamentary deeds of this company) have made an arrangement with the Cork and Waterford Railway for an amalgamation of the two companies, on terms of entire equality.

“To give effect to this arrangement, it is desirable that the shareholders in the Cork, Midleton, and Youghal Railway Company should again execute a parliamentary contract; and, on their so doing, each scrip-certificate held by them will be exchanged for scrip-certificates for shares of 25*l.* each whereon 80*s.* have been paid. The shareholders of the Cork, Midleton, and Youghal Railway Company will therefore have to pay the further sum of 5*s.* per share, in order to equalize the amount paid up by the shareholders in both of the above *companies. [*433 This payment must be made on the exchange of the scrip-certificates.

“The shareholders in the Cork, Midleton, and Youghal Railway Company are requested to attend for the above purposes at the company’s offices, No. 14, Bucklersbury, London, on any day between Saturday, the 17th instant, and the 27th instant, between the hours of 11 and 4 o’clock.

(Signed) “B. J. HACKETT, Secretary.”

In pursuance of the above agreement under seal, the liabilities of the Cork, Midleton, and Youghal Railway Company were discharged, and

the balance of the deposits paid over to the amalgamated board. On the completion of the arrangements contemplated by the deed, the amalgamation was effected upon the terms contained in the said agreement, and the Cork, Midleton, and Youghal Railway Company ceased to have an independent existence, and became merged in the amalgamated Cork and Waterford Railway Company, according to the terms of the said agreement.

In the session of parliament held in the year 1846, the amalgamated board applied for and obtained "The Cork and Waterford Railway Act, 1846," 9 & 10 Vict. c. cccxcvii., by which the plaintiffs were originally incorporated.

The subscription-contract, plans, sections, and books of reference deposited as required by the standing orders of both Houses of Parliament, and upon which the said "Cork and Waterford Railway Act, 1846," was introduced into and sanctioned by parliament, were respectively the subscription-contract, plans, sections, and books of reference of the said Cork and Waterford Railway Company, originally proposed, and not those of the said proposed Cork, Midleton, and Youghal Railway Company; and such plans and sections were the plans *and sections *484] referred to in the 20th section of the said "Cork and Waterford Railway Act, 1846."

No bill was ever introduced into parliament for sanctioning the undertaking contemplated by the said subscription deeds of the said Cork, Midleton, and Youghal Railway Company.

In pursuance of the provision to that effect contained in the said agreement, the directors thereby appointed did, for the purpose of ascertaining the respective interests of the respective subscribers to the said Cork and Waterford Railway and the said Cork, Midleton, and Youghal Railway, and of ascertaining and declaring the shares to which the individual subscribers to the said several undertakings should be respectively entitled in the said joint undertaking, determine and arrange, that, inasmuch as the shares of the said Cork and Waterford Railway Company were of the nominal value of 25*l.*, upon each of which a sum of 1*l.* 10*s.* had been paid, and the shares of the said Cork, Midleton, and Youghal Railway Company were of the nominal value of 50*l.*, upon each of which a sum of 2*l.* 15*s.* had been paid,—for the purpose of equalizing the interests of the said respective subscribers in the proposed amalgamated company (the shares in which were by the last-mentioned agreement to be of the nominal value of 25*l.*), each of the subscribers to the said Cork, Midleton, and Youghal Railway Company should in respect of each share of 50*l.* for which he had so subscribed in the said company, be entitled to two shares of 25*l.* each in the said amalgamated company, upon his paying the sum of 2*s.* 6*d.* upon each and every of such 25*l.* shares in the said amalgamated company, in addition to the said sum of 2*l.* 15*s.* already paid by him upon each share subscribed for by him in

the said Cork, Midleton, and Youghal Railway Company. This arrangement of *shares was made before the passing of the said "Cork and Waterford Railway Act, 1846." [*435]

The defendant never assented to the said agreement of the 23d of January, 1846, or the said arrangement of shares, or the obtaining of the said "Cork and Waterford Railway Act, 1846," any further or otherwise than by executing the said subscription deeds of the said Cork, Midleton, and Youghal Railway Company as aforesaid; and the defendant never has paid or agreed to pay the said sum of 2s. 6d. upon any of the shares in respect of which he stands registered as hereinafter mentioned.

No scrip-certificate of shares in the united undertaking was issued to the defendant; but the name of the defendant was placed upon the first register of shareholders of the incorporated company, as the holder of 100 shares therein, shortly after the passing of the act, and so continued to the present time. The defendant never gave any assent to his name being placed on the said register.

The company incorporated by the said act remained dormant until the year 1853, when a bill, which resulted in the "Cork and Youghal Railway Act, 1854" (17 & 18 Vict. c. ccvi.), was introduced into parliament.

On the occasion of the last special act being in progress, a correspondence between the defendant and the former and present secretary of the plaintiffs took place, a copy of which correspondence accompanied the case, and was to be referred to as part thereof.

The offer of 4s. per share referred to in that correspondence was made by private parties at that time promoting the Cork and Youghal Railway Act, 1854; and it was to be taken as a fact, that, provided the defendant had, by payment of the 2s. 6d. per share, placed himself in a position to transfer, and had actually transferred his shares pursuant to the requirements of the purchasers as *expressed in the secretary's [*486] letters, his shares would have been accepted and paid for; but that, in default of this, the proposed sale was not completed, and the name of the defendant remained upon the said register as proprietor of the said 100 shares.

For the defendant, it is contended that the powers to amalgamate were insufficient, and were imperfectly exercised, and were not binding on the defendant, and that he never became a holder of any shares in the company now suing, within the meaning of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, so as to be liable to pay any sum of money whatsoever to the said company as and for calls upon any such shares; and that, at all events, the defendant never became the holder of a greater number of shares than 50, the number of shares in the said proposed Cork, Midleton, and Youghal Railway Company, for which he originally subscribed.

On behalf of the company it is contended that there is nothing to rebut the *prima facie* case arising from the defendant's being on the register; but that, on the contrary, the powers vested in the directors to amalgamate were legal in themselves, and ample and sufficient for the purpose, that they were exercised in a formal and perfect manner, and so as to be of binding validity against the defendant, and that he consequently became a shareholder in the company so incorporated. They further argue, that, irrespectively of the amalgamation, the defendant was bound by the act of 9 & 10 Vict. c. cccxvii., as an act obtained by the directors of the Cork, Midleton, and Youghal Railway Company under the powers and authorities of the subscription-deeds signed by him.

The question for the opinion of the court was, whether the defendant was or was not, under the circumstances herein set forth, the holder of
 *437] any, and, if so, how many, *shares in the company now suing, within the meaning of the said Companies Clauses Consolidation Act, 1845. If the court determine that the defendant is the holder of any such shares, judgment is to be entered for the plaintiffs for 100*l.*, or for such sum as bears the same proportion to 100*l.* as the number of shares of which the defendant is the holder bears to 100*l.*: but, if the court is of opinion that the defendant is not a holder of any such shares, then judgment is to be entered for the defendant, with such costs in either case as are provided by the order.

The court was to be at liberty to draw any inferences from the facts above stated as a jury would be entitled or directed to draw.

Sir Fitzroy Kelly (with whom was *Horace Lloyd*), for the plaintiffs.(a)

*438] —The liability of the defendant to the *calls in question, as a shareholder in the Cork and Youghal Railway Company, depends upon whether the two originally proposed companies,—the* Cork and Waterford, and the Cork, Midleton, and Youghal,—were so incorporated together or amalgamated as to make all the members or shareholders in each of the proposed companies members or shareholders in the new

(a) The points marked for argument on the part of the plaintiffs, were,—

"1. That the defendant is, and since he was first placed on the register always has been, a shareholder in the company now called 'The Cork and Youghal Railway Company,' in respect of 100 shares.

"2. That the defendant was a subscriber of 2500*l.* to the capital of the Amalgamated Cork and Waterford Railway Company, and that his name was entered on the register of the shareholders of that company: 8 & 9 Vict. c. 16, s. 8.

"3. That the provisional directors of the Cork, Midleton, and Youghal Railway Company were authorized by deeds executed by the defendant to effect such an amalgamation as that actually effected, and to make his subscription applicable thereto; and they duly exercised these powers; and that the Amalgamated Cork and Waterford Railway Company were entitled to place the defendant upon their register as a shareholder.

"4. That the provisional directors did not exceed, or purport to exceed the powers given to them by the said deeds, and in particular that they did not make the defendant or any one else liable to pay any more money than the original deposit until it was regularly called for under the act.

"5. That the defendant, having subscribed for 2500*l.*, was rightly registered as a holder of 100 shares of 25*l.* each, and not of 50 shares of 25*l.* each."

amalgamated company. The facts are shortly these:—In the year 1845, a company was projected for the making of a railway from Cork to Waterford, to be called “The Cork and Waterford Railway,” and another for the making of a railway from Cork to Midleton and Youghal, to be called “The Cork, Midleton, and Youghal Railway.” Each company had a parliamentary or subscription contract and a subscribers’ agreement,—those of the Cork and Waterford Railway Company bearing date the 5th of May, and those of the Cork and Youghal Railway Company the 12th of June, 1845; and each subscription contract contained all the powers usually conferred by companies of this nature upon their directors, amongst others, a power to vary or alter the termini, and also a power to effect an amalgamation with any other railway. Shortly after the formation of these two companies, a negotiation was entered into between the respective boards of directors, which resulted in an agreement that the two companies should be amalgamated, and minutes to that effect were made by each board of directors in their respective minute-books, and a deed was, on the 23d of January, 1846, prepared and executed by the directors of each company to carry out those resolutions. An act of parliament was afterwards obtained. The questions for the determination of the court will be,—first, whether each of these companies did by its subscribers’ agreement confer upon the directors a power to amalgamate,—secondly, whether the directors have by the resolutions *respectively entered into by them, and by the deed of [439 the 23d of January, 1846, well exercised that power. If the two companies could by law be amalgamated, and if the select body of each could derive power to effect an amalgamation, it is difficult to conceive how such power could be more effectually conferred or more aptly exercised. By the Cork and Waterford Company’s subscribers’ agreement, the directors are expressly authorized “to demise or sell the said undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways, and to purchase or take a lease of any other railway or railways.” The deed of the 23d of January, 1846, recites all that was necessary to the amalgamation of the two companies; and by the first provision of the covenanting part expressly declares “that the undertakings of the promoters of the Cork and Waterford Railway Company and of the promoters of the Cork, Midleton, and Youghal Railway Company, shall henceforth be considered to be, and as far as the parties hereto of the first and second parts (the directors of the respective companies) can declare the same, are hereby declared to be, united into one concern and undertaking.” By the amalgamation of the two companies, the shareholders in each became shareholders in the amalgamated company under the act of parliament. By the 8th section of the Companies Clauses Consolidation Act, 1845, it is enacted that “every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise

have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." The 28th section makes the production of the register of shareholders *prima facie evidence* of the party being a shareholder, and of the number and amount *440] of his shares. *The 21st section makes the shareholders liable to calls. And s. 22 enacts that "it shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons, and at the times and places from time to time appointed by the company." By the interpretation clause, s. 2, it is provided that "the expression 'the special act,' used in this act, shall be construed to mean any act which shall be hereafter passed incorporating a joint stock company for the purpose of carrying on any undertaking, and with which this act shall be so incorporated as aforesaid;" and that "the expression 'the undertaking,' shall mean the undertaking or works, of whatever nature, which shall by the special act be authorized to be executed." The amalgamation would be complete by virtue of the two subscribers' agreements and the deed of the 23d of January, 1846. But the act of parliament(a) shows who the company consisted of. If it is not an incorporation of the members or subscribers of both companies, it is impossible to put a sensible construction upon the language, plain and unambiguous as it is, that is used therein. The 1st section contains the usual recital, incorporating the three general acts, The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and The Railways *441] Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, and reciting that "the persons thereafter named, together with other persons, were willing at their own expense to carry such undertaking into execution, but the same could not be effected without the authority of parliament." The 3d section enacts "that George Anderson, George Ashlin, William Frederick Beadon, Frederick Pratt Barlow, Charles Barry Baldwin, John Bowring, LL. D., Pierce Somerset Butler, Thomas Stephen Coppinger, Nicholas Marshall Cummins, George Emery, John Bloxam Elin, Patrick Douglas Hadow, Charles Hulse, *Henry Marshall*, James Murphy the younger, Thomas Wyse, and all other persons and corporations who have already subscribed or shall hereafter subscribe

to the undertaking, and their executors, administrators, successors, and assigns respectively, shall be united into a company for the purpose of making and maintaining the several railways hereinbefore mentioned and hereinafter more particularly defined, with proper works and conveniences belonging thereto, according to the provisions of the said recited acts and of this act, and for other the purposes herein and in the said recited acts contained; and for the purposes aforesaid such company shall be incorporated by the name of 'The Cork and Waterford Railway Company,' and by that name shall be a body corporate, with perpetual succession, and shall have power to purchase and hold lands for the purposes of the undertaking, within the restrictions herein and in the said recited acts contained." Now, one of the persons named in that section, Henry Marshall, had done no more to make him a shareholder in this amalgamated company than this defendant had: he had simply executed the subscribers' agreement of the Cork, Midleton, and Youghal Railway Company. [JERVIS, C. J.—How *can* we know that he had done nothing more? That amounts really to nothing.] It at least anticipates and *disposes of the argument that no person could be a shareholder who had not also signed the subscribers' [*442. agreement of the Cork and Waterford Railway Company. If those who executed the subscription deeds of each of the original companies are not by force of the amalgamation members of the new company, there could be no incorporated company at all. As to the objection that the directors of the amalgamated company exceeded their powers in acting upon the arrangement in the deed of the 23d of January, 1846, for equalizing the shares in the two companies,—the short answer is, that, notwithstanding the clause in the Cork and Youghal subscribers' agreement that no more than 2*l.* 15*s.* per share should be called for until an act of parliament should be obtained, although the directors may in this respect have acted *ultrâ vires*, and the defendant may have been justified in refusing to pay the additional 2*s.* 6*d.* per share, such excess of their powers does not affect the question of amalgamation, or the liability of the defendant to pay subsequent calls. The simple question is,—did the original subscription deeds of the two companies authorize the respective boards of directors to make the amalgamation, and have they properly done so? There are two cases which bear somewhat upon this question, though neither is precisely in point, viz. The Incorporated Proprietors of the Midland Great Western Railway of Ireland *v.* Leech, 8 House of Lords Cases, 872, and The Midland Great Western Railway Company (Ireland) *v.* Gordon, 16 M. & W. 804.† In the former case, a company for making a railway from Dublin to Mullingar was incorporated by an act of parliament passed in July, 1845 (8 & 9 Vict. c. cxix.), under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway,

*443] to be called "The Galway and *Mullingar Junction Railway Company." Three months afterwards, the name was altered at the registration office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. Leech applied for and received scrip-certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name, and under its corporate seal, a petition to parliament for an act to make a railway from Mullingar to Galway, undertaking, at its own expense, to make the railway. The act which was passed upon this petition, in July, 1846 (9 & 10 Vict. c. ccxiv.), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the act to raise the necessary sums "by contributions among themselves, or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company;" and the provisions of the recited act (that of 1845) were to extend to and be read with the new act. The expression "the company," in the new act, was declared to mean, the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting, the seal of the Midland Great Western Company was affixed to the shareholders' book, which however did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one

*444] *of them, that of the defendant, was inserted. Three calls were made, the first was dated previous to the insertion of the subscribers in the shareholders' book, the two others after that insertion. In an action for these calls, it was held by the House of Lords, that the act did not amalgamate the two companies; and that, even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power, so as to render the defendant liable to an action for any one of the calls at the suit of the Midland Great Western Company. There, no amalgamation de facto had taken place: the resolution relied on was a mere recommendation, leaving it open to every subscriber to accede or not, as he pleased. The other case, of *The Midland Great Western Railway Company (Ireland) v. Gordon*, 16 M. & W. 804,† is an authority to show, that, where power is given to the directors by the subscribers' agreement and parliamentary contract to vary or alter the proposed line of the railway, and the directors, in the exercise of that power, do vary or alter the line accordingly, those who have executed the deeds become liable to calls made for the

purpose of constructing and carrying on the works of the altered line.

Byles, Serjeant (with whom was *H. J. Hodgson*), for the defendant. (a) —The first and principal question is, *whether the defendant is a [*445 person who has within the meaning of the 8th section of the 8 & 9 Vict. c. 16, “subscribed the prescribed sum or upwards to the capital of the company,” or who has “otherwise become entitled to a share in the company,” and “whose name has been entered on the register of shareholders.” The word “subscribed” has received an interpretation in *The Thames Tunnel Company v. Sheldon*, 6 B. & C. 341 (E. C. L. R. vol. 13), 9 D. & R. 278 (E. C. L. R. vol. 22), where it was held to mean, not those who have actually made a payment, but those who have stipulated that they will make a payment. Here, the *de- [*446 fendant has signed the subscription deeds of the Cork, Midleton, and Youghal Railway Company, but he has not signed the subscription contract of the Cork and Waterford Railway Company, upon which the act of 1846 proceeds: he is not, therefore, within the first branch of the 8 & 9 Vict. c. 16, s. 8, one who has “subscribed;” and there is no authority for saying that that section embraces one who has entered into a contract under which he may be compelled to sign the deed. Then, has he “otherwise become entitled to a share in the company?” In *The Waterford, Wexford, Wicklow, and Dublin Railway Company v.*

(a) The points marked for argument on the part of the defendant, were,—

“1. That the defendant never became a holder of any shares in the company now suing as plaintiffs, within the meaning of the Companies Clauses Consolidation Act, 1845, so as to be liable to pay calls thereon.

“2. That, under the terms of the subscribers’ agreement of *The Cork, Midleton, and Youghal Railway*, executed by the defendant, the provisional directors of the said company had no power to bind the defendant as a subscriber to the undertaking for making the line of railway sanctioned by the 9 & 10 Vict. c. cccxvii.

“3. That the said provisional directors exceeded the powers conferred upon them by the said subscribers’ agreement, in requiring the defendant and the other subscribers to the said *Cork, Midleton, and Youghal Railway* to pay an additional sum of 5s. upon each of the shares subscribed by them respectively to the said railway beyond the sum of 2l. 15s. per share, before an act of parliament was obtained for the government and constitution of the said undertaking.

“4. That the terms upon which the defendant was attempted to be made a shareholder in the company now suing were not binding upon the defendant, and that he consequently never became legally liable as such a shareholder.

“5. That the agreement of the 23d of January, 1846, and the arrangement of shares made in pursuance thereof, are, as against the defendant, *ultra vires*, and wholly void.

“6. That, if the last-mentioned agreement is to any extent binding upon the defendant, yet that, no scrip or shares having been issued to him in the amalgamated company, he was entitled under it to be deemed a shareholder in the company now suing, in respect of 50 shares, upon each of which 2l. 15s. had been paid.

“7. That, if the defendant ever became a holder of any shares in the company now suing, he became and was so unconditionally upon the 7th of March, 1854, when a valid and absolute contract for the sale of his shares to the said company was made; and the defendant is entitled to avail himself of his right to have that contract specifically performed by the plaintiffs, as an equitable defence to the present action.

“8. That the plaintiffs having denied that the defendant was a shareholder in their company so as to be enabled to transfer his shares under the agreement referred to in the correspondence, are estopped from now treating him as a shareholder for the purpose of making him liable to a call.”

Pidcock, 8 Exch. 279,† the defendant by letter requested the provisional committee to allot to him one hundred shares in a proposed railway company. In answer he received the following letter,—“Sir,—The provisional committee having allotted you fifty shares of 20*l.* each in this undertaking, I am instructed to request that you will pay a deposit upon them of 1*l.* 10*s.* per share on or before the 30th instant to one of the following bankers,” &c. “I beg also to inform you that scrip certificates for the above number of shares will be delivered to you in exchange for this letter and the banker’s receipt for the deposit, after the execution of the parliamentary contract and subscribers’ agreement, which will lie for signature at this office on and after Monday the 30th instant.” At the foot of the letter was the following memorandum,—“The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above; and the parliamentary contract and subscribers’ agreement must be signed on or before the 20th of August, 1845.” The defendant paid the deposit, but did not sign the parliamentary contract or subscribers’ agreement. The company was afterwards incorporated, and the defendant’s name was placed on the sealed register of shareholders: and, in an action for calls, it was *447] held that the defendant was not a shareholder, and that the above circumstances were an answer to the *prima facie* case arising from the production of the register containing the defendant’s name. That case in no respect differs from this, even supposing the proper course was adopted for exercising the powers of amalgamation contended for. The power to amalgamate is bridled or qualified by the proviso (in the Cork, Middleton, and Youghal subscribers’ agreement), “that the subscribers shall in no case be required to pay any sums exceeding the amount of their respective subscriptions, and that no further call shall be made in respect of the said subscriptions until an act of parliament shall have been obtained for the constitution and government of the said undertaking,” &c.,—that is, there shall be no further demand of money until the act is obtained. That proviso becomes the more remarkable when it is contrasted with the provision in the Cork and Waterford subscribers’ agreement, “that the said committee or directors shall have full power to call for payment from each subscriber to the said undertaking of any further sum or sums not exceeding in the whole (including the deposit of 30*s.* per share) the sum of 2*l.* 10*s.* per share.” The Cork and Waterford Company’s subscribers have paid 30*s.* per share of 25*l.*, and the Cork, Middleton, and Youghal Company’s subscribers having paid 55*s.* per share of 50*l.*, it was thought necessary to equalize them. The provision for that purpose in the amalgamating deed of the 23d of January, 1846, is somewhat loose: but the circular set out in the special case very clearly states what the directors have done for the purpose of effecting that equalization. The effect of it is, to intimate to the subscribers of the Cork, Middleton, and Youghal Railway Company that

they shall have no shares in the amalgamated company until they have paid the additional 2s. 6d. per share. [JERVIS, C. J.—Do you admit, subject *to this objection, that the directors of the two companies had power to amalgamate, and that they have duly exercised that power? The legislature seem to have proceeded on the Cork and Waterford Railway Company's subscription contract only. Has there been any amalgamation at all?] Assuming the powers of the directors to be as wide as they are said to be, and assuming that they were legally and regularly executed, the defendant clearly is not a subscriber to "the undertaking," or liable for calls. [CRESSWELL, J.—Would it signify, if parliament acted upon another deed than that which the defendant executed, and which constitutes a subscription to this undertaking?] The undertaking to which the defendant subscribed is altogether abandoned. The 8th section of the 8 & 9 Vict. c. 16, contemplates a subscribing of the deed upon which the act of parliament is obtained. [CRESSWELL, J.—I find no such words in the act.] It is enough to say that the defendant has not subscribed to this undertaking. [JERVIS, C. J.—They altogether abandon the undertaking they begin with.] The subscription deeds and the act of parliament contemplate the continued existence of the original undertaking: the directors have no authority to "amalgamate" by making an entirely new thing. [JERVIS, C. J.—In truth they do not amalgamate at all. They adopt the one project, and reject the other.] Precisely so. The circular requires the defendant to get his scrip in the new company by the 27th of January, 1846: but he could not get the scrip without signing the new subscription agreement, and he could not sign that until he had paid the sum demanded. The defendant might have sold his scrip,—his equitable right to shares in the Cork, Midleton, and Youghal Railway Company; *Shaw v. Holland*, 15 M. & W. 186;† *Lawton v. Hickman*, 9 Q. B. 568 (E. C. L. R. vol. 58): of that right he is deprived by this unauthorized act of the directors. The original scrip *is in effect turned into a letter of allotment: that clearly is a violation of the contract. [*448]

Sir F. Kelly, in reply.—To constitute the defendant a subscriber to the undertaking, it was not necessary that he should actually have executed the subscription contract produced pursuant to the standing orders, and upon which the act of parliament was passed; it was enough that he executed some binding contract whereby he became a subscriber to the undertaking contemplated by the act. If the defendant or any other shareholder in the Cork, Midleton, and Youghal Railway Company has been prejudiced by the circular, or by the refusal of the directors to give him scrip in the new amalgamated company until payment of the 2s. 6d. per share additional, he is not without remedy. The position and rights of the respective shareholders are amply preserved by the amalgamation deed: and no difficulty such as that suggested arises from the fact of a smaller sum having been paid as deposit by one set of

shareholders than was paid by the others. The directors might call for the additional 5s. from the subscribers to the Cork, Midleton, and Youghal Railway Company before making a general call upon the whole of the subscribers to both, when the act of parliament was obtained. [WILLIAMS, J.—Could they make a partial call?] Ex necessitate they must. There is nothing unjust or unreasonable, nothing compulsory in the notice: the subscribers are invited to come and execute a new contract, and to exchange their scrip and pay the difference of price. The proposal was one which the directors had a right to make for the advantage of the whole concern. As to the power of the directors of the two proposed companies to amalgamate, that is hardly disputed: the real question is, whether that power has been well exercised. That the two *450] companies up to a certain extent *contemplated the same or nearly the same line of railway, is clear: each proposed to form a railway from Cork to Youghal, with a branch to the south to Cove, and to the north to Fermoy; but the Cork and Waterford Railway Company contemplated a further extension of their line to Waterford. What more natural than that two lines so competing should be desirous of uniting for the common interest? The parties to each undertaking, when they signed the respective contracts, must have contemplated the very amalgamation which has taken place.

JERVIS, C. J.—I must confess that I entertained considerable doubt on originally reading this case, though that doubt has been much shaken by the fact that my Brother *Byles*, having fully considered the matter, seems to think there is little or nothing in the point which I suggested. But, upon consideration, I incline to think that *Sir Fitzroy Kelly* is right, and that, though ordinarily a consolidation or amalgamation like this would not be warranted by a general authority, yet, looking at the terms of the power which is conferred upon the directors by the deeds in question, it seems to me that they are large enough to comprehend and authorize all that the directors professed to do here. That being so, I think the defendant is a subscriber to the undertaking. The effect of the general authority thus conferred is this:—The defendant says, “I subscribe a certain deed, and I thereby authorize you, the directors, to unite the undertaking to which I subscribe with any similar undertaking, as you may think fit, and so to make me a subscriber to that also.” In truth, therefore, the defendant, by executing the subscription deeds of the Cork, Midleton, and Youghal Railway Company, authorized the directors to do that which in effect made him a party to *451] the Cork and Waterford Company’s deeds also. Then, however, *comes the difficulty,—how many shares has he engaged to take? and how is the proportion to be arrived at? In the Cork, Midleton, and Youghal Railway Company’s deeds no capital is mentioned; in the Cork and Waterford Railway Company’s deeds the amount of capital named is 1,000,000*l.*; and in the act of parliament (9 & 10 Vict. c.

ccxcvii., s. 4), the capital named is 1,500,000*l.*, divided (s. 5) into 60,000 shares of 25*l.* each. But I think it is hardly necessary to work out that calculation. The defendant gives the directors a general authority. He says, I will subscribe 2500*l.*, to be composed of 50 shares at 50*l.* a share, or that which represents that number; and you the directors may in your discretion apply that to any other undertaking of a similar kind. My Brother *Byles* says that the defendant is prejudiced by being called upon to pay 5*s.* for each original share, or 2*s.* 6*d.* for each substituted share, before he can get his scrip in the new company. That, however, is not done by the deed. The deed merely substitutes two shares of the nominal value of 25*l.* each for one of 50*l.* It is the inequality of the deposits paid by the subscribers to the two undertakings that creates the difficulty, if any. It might be that a little difficulty might be placed in the way of a sale of the shares, inasmuch as the assignee of an allottee stands in a somewhat different position from one who buys scrip. But he never would pay more than his aliquot proportion. It is enough to say, however, that that is no part of the arrangement that is contemplated by the deed. Upon the whole I think the plaintiffs are entitled to judgment.

CRESSWELL, J.—I am of the same opinion. It seems to me that the original subscription deeds of the Cork, Midleton, and Youghal Railway Company gave power to the directors to amalgamate their undertaking with that of the Cork and Waterford Railway Company. *They [452 thereby acquire very extensive powers: the framers of the subscribers' agreement seem to have exhausted the language for the purpose of conveying power the most ample that could be delegated. My Brother *Byles* says the directors have not exercised the powers so conferred, because they were subject to a condition that the subscribers should not be called upon to pay more than 2*l.* 15*s.* per share until an act of parliament had been obtained. He is not called upon to pay more. He may do as he pleases. He can either accede to the proposal of the directors, and take scrip in the new undertaking in exchange for his scrip in the original undertaking, or he may retain his scrip, and claim shares of corresponding value in the new concern. My Lord has explained the difficulty that apparently existed with regard to the proportion which the defendant was to have, by showing, that, as there was no sum fixed in the deeds as the capital of the Cork, Midleton, and Youghal Railway Company, he left it to the directors; and, when they fixed the capital of the amalgamated company at 1,500,000*l.*, to be divided in 60,000 shares of 25*l.* each, he consented to take out his subscription of 2500*l.* in 25*l.* instead of 50*l.* shares. As to the difference in the amount of the respective deposits, there could be no difficulty in settling that now, by making a call of 5*l.* per share upon the whole of the subscribers, giving credit to each for so much as had already been paid by him. I do not see that there would be any impropriety in a company in the

course of formation issuing scrip on payment of a certain deposit, say 1*l.* per share, and then, finding that that sum was not sufficient for the exigencies of the company, giving notice that no further scrip will be issued except upon payment of a deposit of 25*s.* or 30*s.* The only consequence would be that there would be two classes of scrip certificates, *453] upon one of which one sum had *been paid, and upon the other another sum: but all that might be rectified and the burthen equalized when the directors came to make the first call. Upon the whole, therefore, I concur with my Lord in thinking that the plaintiffs are entitled to recover.

WILLIAMS, J.—I am of the same opinion. I feel no doubt whatever that the subscription deeds of the Cork and Waterford Railway Company, and the Cork, Midleton, and Youghal Railway Company, conferred upon the directors of those two companies the power of amalgamation which they professed to exercise: and I think that the execution of the deed of the 23d of January, 1846, was a sufficient exercise of that power, and operated as a lawful amalgamation or union of the Cork and Waterford with the Cork, Midleton, and Youghal Railway Company. So far my mind is free from doubt. But I must confess that I have felt some doubt,—which is not yet entirely removed,—as to the rest of the case. It is clear, that, when the agreement of the 23d of January, 1846, was executed, it remained to be ascertained what were the respective interests of the several shareholders or subscribers of each company, and what their respective interests in the capital stock of the new company. That is not provided for to this moment, except by the execution of the powers conferred upon the directors by that deed. I have great difficulty in saying that they have exercised that power legally. That, however, is an objection not so much showing a violation of the provision in the subscribers' agreement of the Cork, Midleton, and Youghal Railway Company, because the subscription remains unaltered, and the subscribers are not called upon to add to its amount: but I feel a difficulty in saying that the directors, in executing the powers conferred upon them by the agreement of the 23d of January, *454] 1846, had any power to *call upon the subscribers to the Cork, Midleton, and Youghal Railway to pay 2*s.* 6*d.* per share for having their scrip exchanged. But, upon the whole, notwithstanding the doubt on my mind, it is not strong enough to induce me to dissent from the view which my Lord and my learned Brothers have taken of the case, and therefore I concur with them in thinking that there should be judgment for the plaintiffs.

WILLES, J., concurred.

Judgment for the plaintiffs.

COCKERELL v. THE VAN DIEMEN'S LAND COMPANY.

June 6.

By an act incorporating a joint stock company, the directors were empowered to make calls, giving twenty days' notice of the time and place of payment in the London Gazette and in two or more of the daily London newspapers; and it was enacted, that, if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should *absolutely forfeit* all his share in the capital stock of the company, and all profits and advantages thereof, to and for the use and benefit of the company; and all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the company, to the owner thereof, by notice in writing left at his *usual or last place of abode*, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen:—"

Held, no absolute forfeiture until after the thirty days' notice.

A., B. & Co. carried on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in September, 1847, and in March, 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, and in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was (but without the knowledge of A.) affixed to the office in Austin Friars, directing that letters and communications for A., B. & Co. should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; and, after A. left England, C. gave directions that letters and communications for *either of the partners* should be forwarded to D. (who had been a member of the firm); and D. gave directions that all letters or communications for A., should be forwarded to E.; but E. had no authority to act for the plaintiff touching his private affairs.

A. was the holder of two hundred shares in the company incorporated by the above-mentioned act, and was one of the directors thereof. At a general meeting held in March, 1851, his shares were declared forfeited for non-payment of calls, and, on the 15th of May, 1852, a notice of the forfeiture, enclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it: and it never reached the hands or came to the knowledge of A.:—

Held, not a sufficient service of the notice,—although in the deed of transfer of the shares to him, in the resolution appointing him a director of the company, and in every document signed by him in relation to the affairs of the company, he was described as "of Austin Friars."

And, held, that, in an action against the company for improperly withholding the shares after a tender of the sum due for calls and interest, A. was entitled to recover their value at the market-price of the day of the tender, deducting the amount of calls and interest.

THIS was an action against The Van Diemen's Land Company, by the plaintiff, who claimed to be a *shareholder therein, for im- [*455 properly declaring his shares forfeited.

The first count of the declaration stated, that, by an act of parliament passed in the year 1825 (6 G. 4, c. xxxix.), it was enacted, that, in case the then king should, within three years after the passing of that act by charter, grant that the person therein named should be a body politic and corporate by the name of "The Van Diemen's Land Company," they should have the powers therein named; and it was also enacted that the shares in the capital stock of the said company, and in the profits and advantages thereof, should be and be deemed personal estate;

and as such personal estate should be transmissible accordingly ; and also that the said company, or the directors thereof, should cause the names and designations of the several persons who had subscribed for, or might at any time thereafter be entitled to, a share or shares in the capital stock of the said company, with the number of such share or shares, and also the proper number by which every share should be distinguished, to be fairly and distinctly entered in a book or books to be kept by their clerks, and that, after such entry, a certificate under the common seal of the said company, and countersigned by the clerk, should be delivered to every proprietor, upon demand, specifying the share or shares to which he or she should be entitled in the said company, and that such certificate should be admitted in all courts whatsoever as evidence of the title of such proprietor to the share or shares therein specified, but that the want of such certificate should not hinder or prevent the owner of any of the said shares from selling or disposing *456] thereof; and by the said act power was given to the directors of the said company to make calls for money from the proprietors of the said company, in the manner therein directed; and it was by the said act further enacted, that, if any subscriber, or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, successors, or assigns, should neglect or refuse to pay his, her, or their part or portion of the money to be called for by the directors, during the space of three calendar months next after the appointed time of payment, then and in every such case such person or persons so neglecting or refusing should absolutely forfeit all his, her, or their share or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company; but that no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing left at his, her, or their usual or last place of abode: Averment, that, within three years of the passing of the said act, and before the occurrence of the grievances thereafter mentioned, the then king, by charter, granted that the persons therein named should be a body politic and corporate in name and in deed by the name of The Van Diemen's Land Company, and by that name should and might sue and be sued: And that, before the occurrence of the grievances thereafter mentioned, the plaintiff was the lawful holder and proprietor of 200 shares in the capital stock of the said company, of the value of 20,000*l.*, and that the defendants afterwards wrongfully *457] and without reasonable cause declared the *said shares of the plaintiff to be forfeited: Breach, that, although thirty days' notice had not been given by the directors of the said company, under

the hand of the clerk of the said company, to the plaintiff, the owner of the said shares, by notice in writing left at his usual or last place of abode, in the manner and form required by the said act, and although the same had not been declared to be forfeited at any general or special general meeting of the proprietors held not earlier than three calendar months next after the supposed forfeiture happened, yet the defendants had taken advantage of such forfeiture as aforesaid, among other respects, in this, that, relying on the said forfeiture, they had refused, and still did refuse, to recognise him as such owner; and also in this, that, relying on such forfeiture, they did not treat the plaintiff as owner of the said shares when they made subsequent calls for the purpose of the said company; and also in this, that, relying on the said forfeiture, they had refused, and still refused, to receive the amount of all moneys for calls or otherwise due or payable from the said plaintiff, or in respect of the said shares, to the defendants, although the plaintiff, a reasonable time before the commencement of this suit, tendered and offered and was ready and willing to pay such amount, together with lawful interest from the appointed time of payment; and the defendants had further taken such advantage as aforesaid in various other respects, contrary to their duty in that behalf.

The second count stated, that, the plaintiff being owner of the said shares, and the same being unforfeited, the defendants wrongfully refused to receive the amount of certain calls made and due thereon, and wrongfully refused to make calls thereon when calls were made on the shares generally in the company, and wrongfully removed and erased the plaintiff's name from *the register book or list of subscribers, where-
by the plaintiff had been deprived of the benefit of his right and title as such proprietor, and whereby the plaintiff did not appear in the book or books kept by the clerk of the said company to be the proprietor of the said shares, and whereby the name of the plaintiff as such proprietor did not appear in the registry book or list of subscribers and proprietors of the said company, and whereby the plaintiff had been deprived of the profits of the said shares, and of voting at the meetings of the shareholders, and whereby the right and title of the plaintiff to the said shares had been slandered and damnified; and the plaintiff had also been further damnified in this, that, after the default of duty of the defendants in this declaration alleged, the market price of the shares in the said company rose in value, and the plaintiff by such default had lost the opportunity of making sale of the said shares of which he was owner as aforesaid before the commencement of this suit. [458]

The defendants pleaded,—first, as to the first count of the declaration, that is to say, to so much of the declaration as preceded and ended with the words “and the defendants had further taken such advantage as aforesaid in various other respects, contrary to their duty in that behalf,” that, after the plaintiff had become, and whilst he continued, such

holder and proprietor as therein mentioned, and long before the committing of the said supposed grievances, or any of them, therein mentioned, the directors of the said company, under and in pursuance of, and in conformity with, the powers and provisions of the statute in the first count mentioned, made divers calls of and for money from the several subscribers and proprietors of the said company, not exceeding in the whole the sum of 100*l.* each on each of the shares held by him, her, or them respectively in the capital stock of the said company, but being *459] much less *than the said sum of 100*l.*, the said calls for money being such calls and such money as the directors from time to time found wanting and necessary for the purposes of the said company, no one such call exceeding the sum of 10*l.* sterling for or in respect of any one share of 100*l.*, and no such call being made but at the distance of three calendar months at least from another; and that the said sums so called for from the plaintiff for and in respect of his said shares were not, nor was any part thereof, paid to or for the treasurer or treasurers of the said company by the plaintiff, or to or for the said company, or otherwise howsoever, by the plaintiff, but the same remaining wholly unpaid by him, notwithstanding that twenty days' previous notice at the least of the several and respective times and places appointed for payment of the said several calls and sums of money was on every occasion given in the London Gazette and in two or more of the daily London newspapers, as the directors on the occasions of the said calls directed: and the plaintiff wholly neglected and refused to pay his part and portion of the money so called for by the directors as aforesaid during the space of three calendar months next after the respective times appointed for payment thereof, together with lawful interest; whereupon, and by virtue of the said statute, before the committing of the said supposed grievances, or any of them, the plaintiff absolutely forfeited all his share and shares in the capital stock of the said company, and all profits and advantages thereof, to and for the use and benefit of the said company: and that, before the committing of the said supposed grievances, or any of them, thirty days' notice had been given by the directors of the said company, under the hand of the clerk of the said company, to the plaintiff, by notice in writing left at his usual or last place of abode; and the said *460] shares of the plaintiff were declared to be forfeited, at a general *meeting of the proprietors of shares in the capital stock of the said company held not earlier than three calendar months next after the said forfeiture happened, and that the said periods of thirty days, and three calendar months, respectively, occurred long before the committing of the said supposed grievances, or any of them, and long before the said supposed tender and offer in the first count mentioned; wherefore the defendants took the said supposed advantages in that count mentioned, as they lawfully might for the cause aforesaid.

Secondly, for a further plea to the premises in the introductory part of the last plea mentioned, that, after the plaintiff had become, and whilst he continued, such holder and proprietor as therein mentioned, and long before the committing of the said supposed grievances, or any of them, therein mentioned, the directors of the said company, under and in pursuance of, and in conformity with, the powers and provisions of the statute in the first count mentioned, made divers calls of and for money from the several subscribers and proprietors of the said company, not exceeding in the whole the sum of 100*l.* each on each of the shares held by him, her, or them respectively in the capital stock of the said company, but being much less than the said sum of 100*l.*, the said calls for money being such calls and such money as the directors from time to time found wanting and necessary for the purposes of the said company, no one such call exceeding the sum of 10*l.* sterling for or in respect of any one share of 100*l.*, and no such call being made but at the distance of three calendar months at least from another; and that the said sums so called for from the plaintiff for and in respect of his said shares were not, nor was any part thereof, paid to or for the treasurer or treasurers of the said company by the plaintiff, or to or for the said company or otherwise howsoever by the plaintiff, but the same remained wholly unpaid by him, *notwithstanding that twenty days' previous notice at the least of the several and respective times and places appointed for payment of the said several calls and sums of money was on every occasion given in the London Gazette, and two or more of the daily London newspapers, as the directors on the occasion of the said calls directed; and the plaintiff wholly neglected to pay his part and portion of the money so called for by the directors as aforesaid during the space of three calendar months next after the respective times appointed for payment thereof, together with lawful interest: whereupon, and by virtue of the said statute, the plaintiff became and was liable to be sued by the said company for and in respect of the said sums of money so called for, for and in respect of the said shares, amounting in the whole to a large sum of money, to wit, 10,000*l.*; and thereupon, the plaintiff being so liable, and the said shares of him the plaintiff being of small value, that is to say, less than the amount of the said sum of money to which the plaintiff was so liable as aforesaid, and the plaintiff being unable to pay the said company the said sum of money to which he was so liable as aforesaid, afterwards, and before the committing of the said supposed breaches in the first count mentioned, or any of them, and before the said supposed tender therein mentioned, the plaintiff voluntarily abandoned and gave up to the said company his said shares, and all interest therein, and the said company then accepted and received the said shares and interest for and in satisfaction and discharge of the said sum of money, and of the said liability of the plaintiff to the said company; wherefore the said company

took the said supposed advantages in that count mentioned, as they lawfully might for the cause aforesaid.

Thirdly, "to the last count, that is to say, to the residue of the declaration," that the plaintiff was not the owner of the said shares, as alleged.

*Fourthly, to the same count, that the said shares, at the said *462] time when, &c., were forfeited.

Fifthly, to the whole declaration, not guilty.

Sixthly, to the first count, that the plaintiff was not then holder or proprietor of the said shares therein mentioned, or any of them, as alleged.

The plaintiff took issue on the first and second pleas, and joined issue upon the third, fourth, fifth, and last pleas.

The cause was tried at the London Sittings after Hilary Term, 1855, before Jervis, C. J., when a verdict was found for the plaintiff for 3000*l.*, subject to the opinion of the court upon the following case,—of which the pleadings, the act of parliament, and the company's charter were to form a part:—

At the times of the passing of the act and the granting of the charter, and for several years afterwards, the plaintiff carried on business in partnership with certain other persons, under the firm of Cockerell, Larpent & Co., at offices No. 8, Austin Friars, in the city of London; and the plaintiff was the owner of 200 shares of the capital stock of the company.

Before the month of November, 1847, calls to the amount of 25*l.* had been paid on each of those shares. On the 4th of November, 1847, the 7th of June, 1849, and the 15th of August, 1850, calls of 1*l.* on each share of the stock of the company were duly made by the directors, and previous notice of the times and places of payment was duly given by advertisement, as directed by the act. These calls were payable on the 15th of January, 1848, the 18th of July, 1849, and the 25th of September, 1850, respectively. They have not been paid. The shares were 100*l.* shares.

The plaintiff proved that he did not know of the making of these calls, or any of them, except as in this case appears.

*At the annual general meeting of the proprietors of the com-
*463] pany, held pursuant to their act, on the 31st of March, 1851, the plaintiff's shares were declared forfeited, and the following declaration was made, and entered in the books of the company:—

"The chairman then informed the meeting that the directors had felt it their duty to propose for forfeiture certain shares, on which more than one call was in arrear, to the number of 551, the particulars of which were read by the secretary, as follows:—[Here, among others, followed the number of the plaintiff's shares] 200 shares late the property of John Cockerell, of 8, Austin Friars, in the city of London.

(Signed)

"J. CATTLEY, Chairman."

In April, 1851, a call was in like manner made of 10s. on each share of the company; but no call was made on the plaintiff or upon any shares as being his property,—the directors and the company regarding his shares as forfeited.

At the annual general meeting of the proprietors, held on the 12th of March, 1852, the foregoing declaration at the meeting of the 31st of March, 1851, was confirmed.

The firm of which the plaintiff was a member stopped payment in September, 1847. Its affairs were liquidated under an arrangement with their creditors under inspectors, of whom Mr. Horsley Palmer was one: and, after that month, the firm did nothing more than conduct to a conclusion the liquidation of their affairs for the benefit of their creditors. The firm was dissolved in March, 1848. In winding up the affairs under the inspectors, Mr. Noble, one of the firm, was the most active; attending at the premises in Austin Friars almost every day. *Mr. Noble had no authority to act for the plaintiff as to his private affairs.* The premises in Austin Friars were not closed until two or three years after the stoppage.

*A Mr. James Edward Coleman acted as accountant for the inspectors in regard to the affairs of the firm: but he did not [*464 act, and had no authority to act, touching the private affairs of any of the members of the firm: and he never had any communication with the plaintiff, and never saw him touching the private affairs of the plaintiff. A Mr. John H. Palmer, a merchant in London, acted as the friend of the plaintiff, and by his directions, in paying the trust dividends to his private creditors, under a deed of arrangement hereinafter mentioned, *and acted for him in nothing else.*

No business connected with the private affairs of the plaintiff was transacted after the said stoppage at the premises in Austin Friars. Letters addressed to him there, came there after he left England. The plaintiff left England in May, 1849, and went to reside on the continent, where he has ever since resided.

The plaintiff never slept at Austin Friars, or used the premises there otherwise than for business.

At the time of the stoppage of payment of the firm, the plaintiff occupied a house in Hyde Park Gardens, London, and another at Burton Hill, Wiltshire. He then gave up those houses, and afterwards became an inmate with his sister at Longton, Essex. He next went abroad, the premises in Austin Friars then being, and afterwards continuing to be, occupied as herein mentioned.

His shares were principally transferred to him. There were twelve deeds of transfer, executed to and by him, in all of which he was described as of Austin Friars; and in the certificates of the same shares he was described as of Austin Friars. He was a director of the company from 1839, and attended several meetings. He was elected as of

8 Austin Friars. The plaintiff proved that notices and communications of every kind relating to the Van Diemen's Land Company were sent *465] to his address there, and that he never gave any directions that they should be sent in any other way.

Before leaving England, viz. on the 24th of November, 1848, the plaintiff made an arrangement with his private creditors, by a deed, which was to be taken as part of the case, and in which also he was described as of Austin Friars.

A board, with an inscription of which the following is a copy, was affixed at the offices No. 8 Austin Friars, some time before May, 1852; but the precise time of its being affixed did not appear,—

“Letters and communications for Cockerell, Larpent & Co., to be left at the office of Mr. J. E. Coleman, 86 Coleman Street.”

The plaintiff proved that the above board was put up without his knowledge or direct authority, otherwise than is to be inferred from the circumstances; nor did he know of the same until after the commencement of this action.

Before the plaintiff left England, it was the duty of the clerk at Austin Friars to forward all letters addressed to the plaintiff which came to Austin Friars, to the private residence of the plaintiff, in Hyde Park Gardens, or the country.

After the plaintiff left England, Mr. Coleman gave directions that letters and communications for either of the partners should be forwarded to Mr. Noble, who had an office in the city; and Mr. Noble gave directions that all letters or communications for the plaintiff should be forwarded to the plaintiff's brother, Mr. S. P. Cockerell. Mr. Noble had no authority to act for the plaintiff touching his private affairs.

On the 15th of May, 1852, a clerk of the defendants' attorneys, on behalf of the defendants, went with the notice hereinafter mentioned to No. 8 Austin Friars, whereat the said business of the firm of Cockerell, Larpent & Co. had formerly been carried on; and, finding the office *466] shut up, and after seeing the said board, he left with Mr. Coleman, at his office in Coleman Street, on the same day, a letter from the defendants' attorneys, of which the following is a copy:—

“19 Coleman Street, 15th of May, 1852.

“Dear Sir,—As we understand that the affairs of Messrs. Cockerell, Larpent & Co. are in your hands, may we request that you will procure the acceptance of service of the accompanying notice on behalf of Mr. John Cockerell. We enclose the notice in duplicate, and will thank you to get the receipt on one copy signed by the party accepting the service.

“BISCHOFF & COX.

“J. E. Coleman, Esq., 86 Coleman Street.”

In the letter was the following notice, in duplicate, signed by Mr. Cattley, the clerk of the defendants:—

"John Cockerell, Esq.

"Sir,—By order of the court of directors of the Van Diemen's Land Company, I hereby give you notice, that, at a general court of proprietors of the said company, held on the 31st of March, 1851, it was, amongst other things, resolved, that, in consequence of your having neglected to pay the calls on the shares standing in your name, for the space of three calendar months next after the time appointed for payment thereof, the same shares, and all franchises and interest therein, and all the profits and advantages thereof, and all moneys theretofore advanced on account thereof, should be absolutely forfeited to or for the use and benefit of the said company; and the same were thereby declared to be forfeited accordingly, and you were thereby declared disfranchised and removed from the said company. But no advantage will be taken of such forfeiture until after the expiration of thirty days from the date of this notice. Dated, this 15th day of May, 1852.

"H. CATTLEY, clerk to the said company."

No answer was sent to this letter; and the above *notice never came to the hands or knowledge of the plaintiff; and it was to be [*467 taken that the same was lost, without prejudice to any question of service of notice. Notice to produce it was duly given.

Mr. Coleman, who was examined as a witness on behalf of the defendants, said that, to the best of his recollection, he forwarded the notice to Mr. Noble. Mr. Noble stated that he had no recollection of having received or seen any letter sent by Mr. Coleman to or for the plaintiff in 1852, and that he never saw a document like the above notice,—a copy of which was shown to him on his examination by the defendants' counsel.

On the 20th of May, 1852, at a court of directors of the company, the following took place, and was duly entered in the books of the company:—

The chairman informed the court that the secretary had attended at the office of the company's solicitors on Thursday, the 18th instant, and had there signed certain notices drawn up agreeably with the requirements of the act of parliament, addressed to those persons whose shares had been forfeited (amongst others), as follows,—“shares forfeited at the general meeting of proprietors on the 31st of March, 1851,—John Cockerell, 200 shares.” And the chairman further informed the court, that, after the expiration of thirty days from the delivery of the said notices, the shares would become finally and completely forfeited, unless payment of the overdue calls was made in the mean time.

Save as in this case appears, no notice of the forfeiture of the said shares of the plaintiff was ever given; nor did the plaintiff, or any person authorized to act for him, know of the above resolutions until after this action was brought; nor did the plaintiff or any person authorized to act for him, know of the alleged forfeiture until the end of the month

*468] of December, 1852, when Mr. Palmer *was verbally informed thereof, and thereupon communicated with the plaintiff.

On the 11th of January, 1853, the plaintiff caused to be tendered to the defendants a sufficient sum to cover the amount of the calls on the 200 shares, with interest thereon from the time they were payable, and stated he did so to enable him to sell the shares. The defendants refused to receive the same, on the ground that they considered the shares had been legally forfeited, and that they could not in any manner recognise the plaintiff's right to such shares.

It was proved by Mr. Whettenhall, a share-broker called by the plaintiff, that the market-price of the shares on the day of the tender was 20*l.* a share: the price between that time and the time of trial fluctuated very much; they were as low as 14½ (14*l.* 10*s.*) and as high as 26*l.* 10*s.*: that, at the commencement of the action they were 14½, and at the time of the trial they were 18*l.* On the 4th of November, 1847, the shares were not quoted in the market. In June 1849, after the second of the before-mentioned calls, they were worth 30*s.* On the 31st of March, 1851, they were worth 1*l.* or 80*s.* On the 12th of March, 1852, and in May, 1852, the shares were not quoted at all. The price of the shares did not rise until October, 1852; up to which date, it is a fact that the shares were worth very little. Until the following December, there was no quotation for them: they then rose to 5*l.* 10*s.*, and on the 22d of December to 40*l.* In the quotation it is assumed that all calls are paid.

The amount of the verdict was taken by direction of the Lord Chief Justice, subject to the opinion of the court. The shares were treated as worth 19*l.* a share on the day of the tender; his Lordship suggesting (which was agreed to) that 1*l.* a share be deducted, to allow for a depreciation of the market by the selling of *200 shares at one time. *469] The value of the shares, after allowing for the calls and interest, it was agreed would by this mode amount to 3000*l.*

The court was to be at liberty to draw all inferences that a jury would be justified in doing, and to have all powers of a judge at Nisi Prius as to amendment and otherwise.

The first question for the opinion of the court, is, whether the verdict is to stand for the plaintiff, or to be entered for the defendants on any and what issues. If it is to stand for the plaintiff,—secondly, upon what principle is the amount of the damages to be ascertained?

If the court should be of opinion in the affirmative of the first question, the verdict is to be entered for the plaintiff, according to the principle which the court may direct,—the amount to be settled by the court.

If the court should be of opinion in the negative of the first question, the verdict is to be entered for the defendants upon such issues as the court may direct.

Montague Smith (with whom was *Barstow*), for the plaintiff.(a)—The first question which is presented to *the court upon this special case, turns upon the construction of two or three sections of the [*470 company's act of incorporation, 6 G. 4, c. xxxix. The 1st section makes them a body corporate under the name of "The Van Diemen's Land Company." The 5th section enacts that the shares in the capital stock of the company, and in the profits and advantages thereof, shall be personal estate, and transmissible accordingly. The 9th section provides a form of transfer, and the 10th enacts that no shares shall be sold or transferred after a call made and due, until the money is paid. The 13th section empowers the directors to make calls not exceeding in the whole 100*l.* on each share, so that no one call exceed 10*l.* per share, or be made but at the distance of three months from the preceding call; "and the said several sums of money so called for shall be paid at such time and place as shall be appointed by the directors of the said company, of which time and place twenty days' previous notice at least shall be given in the London Gazette, and in two or more of the daily London newspapers, as the said directors shall direct:" and the 14th, which is the material section, enacts, "that, if any subscriber, or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, successors, or assigns, shall neglect or refuse to pay his, her, or their part or portion of the money to be called for by the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the appointed time of payment, then and in every such case such person or persons so neglecting *or refusing, shall absolutely forfeit all his, her, or their share [*471 or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company; and all shares which shall or may be so forfeited shall or may at any time or times thereafter be sold at a public sale, for the most money that can be gotten for the same, and the produce thereof shall go to and make part of the capital of the said company; but *no advantage shall be taken of such forfeiture of any share or shares, until after*

(a) The points marked for argument on the part of the plaintiff, were,—

"That, assuming a forfeiture of the shares had been incurred by non-payment of the calls in question, there had never been the thirty days' notice required by the 14th section of the company's act, 6 Geo. 4, c. xxxix., to entitle them to take advantage of such forfeiture; and that the facts disclosed by the special case, showed, that, without such notice, the company had taken advantage of such forfeiture, to the plaintiff's damage.

"And, as to the damages,—that, after the tender, the plaintiff was entitled, as between him and the company, to all the rights of owner of the shares; that the case showed that he might at the time of the tender have sold the shares at 20*l.* per share; that, as against the defendants, he was entitled to take their value at not less than that sum; and, further, that he was entitled to have them taken at the highest sum to which they rose before the commencement of the action, and that the time of the commencement of the action was not the proper time at which the calculation should be made.

thirty days' notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing *left at his, her, or their usual or last place of abode*, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen; and that every such forfeiture so to be declared, shall be an absolute indemnification and discharge to and for the proprietor and proprietors, or his, her, or their executors, administrators, successors, and assigns, so forfeiting, against all actions, suits, and prosecutions, for any breach of contract or other agreement between such proprietor or proprietors, his, her, or their executors, administrators, successors, and assigns, and the said company, with regard to the future carrying on and managing of the said company." Taking the *whole* of the clause together, it is plain that the legislature did not mean that the shares should be *absolutely forfeited* at the end of the three months, but only that they should be *forfeitable*, that is, that the company should have a right to declare them forfeited, the proper notice having been *472] given. And there is good reason why this should be *so; for, there is no provision in the act for notice to be given to individual shareholders. This construction is fortified by the words giving the power of sale "at any time or times thereafter,"—that is, after the thirty days, for, it would manifestly be idle to give the notice, if the shares could be sold before its expiration. That this was the construction put upon the act by the company themselves, is clear from the entry made in the company's book on the 20th of May, 1852, as set out in the special case. [JERVIS, C. J.—If the act of parliament means that the shares are forfeited, with the power to redeem the forfeiture within thirty days, you have, subject to the question as to the notice, complied with it, because you tendered the amount due for calls within thirty days after the forfeiture first came to your knowledge.] Either construction will answer the plaintiff's purpose. If a condition precedent, the notice must be given before a forfeiture is incurred: if a condition subsequent, it has been performed. The next question is, whether in point of fact a notice was given. The facts found in the special case clearly show that no notice was served at all. The act requires that the notice shall be served at "the usual or last place of abode" of the shareholder. Assuming, for argument sake, that No. 8 Austin Friars was the plaintiff's usual or last place of abode, what occurred here was giving an entirely different direction to the notice. It appears that Cockerell, Larpent & Co. carried on their business at No. 8 Austin Friars. Mr. Cockerell had two private residences,—one, in Hyde Park Gardens,—the other, in Wiltshire. The firm stopped payment in September, 1847; and in March, 1848, the partnership was dissolved; though the office in Austin Friars was not closed for two or three years after.

Upon the stoppage of the firm, the plaintiff gave up his two residences, and for some time became an inmate with his sister at Loughton, *in Essex; and in May, 1849, he went to reside on the continent. [473 Some time before May, 1852, a board with the following inscription,—“Letters and communications for Cockerell, Larpent & Co., to be left at the office of Mr. J. E. Coleman, 86 Coleman Street,”—was affixed at the offices in Austin Friars; but of this the plaintiff had no knowledge. The case finds, that, before the plaintiff left England, it was the duty of the clerk at No. 8 Austin Friars to forward all letters addressed to the plaintiff; which came there, to the plaintiff’s private residence in Hyde Park Gardens, or Wiltshire; and that, after he left England, Mr. Coleman gave directions that letters and communications *for either of the partners* should be forwarded to Mr. Noble (who had been a member of the firm); and Mr. Noble gave directions that all letters or communications *for the plaintiff* should be forwarded to his brother, Mr. S. P. Cockerell: but *Mr. Noble had no authority to act for the plaintiff touching his private affairs*. [JERVIS, C. J.—It is plain that the notice was not left at the plaintiff’s “last place of abode.” The notice was in fact served upon Coleman. Had he authority to receive it for the plaintiff?] The case expressly negatives that either Coleman or Noble had any authority to act for the plaintiff in relation to his private affairs. He had no implied authority to put up the board, for all implied authority would necessarily terminate on the dissolution of the partnership. No. 8 Austin Friars was not the plaintiff’s place of abode; there was no authority, express or implied, in Coleman or in Noble, to receive notices for him or to act in any way touching his private affairs; and the board was affixed there without his authority and without his knowledge. Under these circumstances, he clearly had no notice of the calls. If, when the notice was served on Coleman, he had been told it was served on him as agent for the plaintiff, he might have declined to take *it, or it might have been preserved with more [474 care. In fact, Coleman is treated as the agent of the defendants, to procure the acceptance by some one having authority of the service on behalf of the plaintiff.

Hugh Hill (with whom was *Unthank*), contra.(a)—In considering

(a) The points marked for argument on the part of the defendants, were as follows,—

“That by the company’s act, 6 G. 4, c. xxxix., s. 14, the plaintiff’s shares were absolutely forfeited, on non-payment of the calls for three calendar months.

“That the plaintiff, who had so forfeited his shares, could not by his own act, as by tendering the amount of calls, without the assent of the company, purge the forfeiture.

“That, until the company waived the forfeiture, the plaintiff had no right to sue the company, on the footing of his being entitled to the shares.

“That, as the plaintiff had forfeited his shares, and the company had not agreed to waive the forfeiture, the company and its officers had the right to refuse to receive from the plaintiff the calls, and had a right to remove his name from the register-book.

“That the notice in writing mentioned in the case was unnecessary; but was, if necessary, under the circumstances, sufficient, and sufficiently served.

“And that, if, by tendering the calls, and without the company’s consent, the plaintiff could

this case, it will be important to bear in mind, that, in the deed by which the shares in question were transferred to him, in the resolution appointing him a director of the company, and in every document signed by him in relation to the affairs of the company, the plaintiff was always described as of "Austin Friars;" that, by his own direction, all communications from the company were addressed to him there; and that, in the deed of the 24th of November, 1848, mentioned in the case, and in which certain of these shares are dealt with, he is also described as *475] of that place. It appears, that, *from the year 1847 down to the mouth of December, 1852, the shares were of a mere nominal value,—at the most from 20s. to 30s. per share, with a call of 2l. paid. In November, 1847, Cockerell, Larpent & Co. stopped payment. In May, 1849, Mr. Cockerell goes abroad, and nothing more is heard of him until the 11th of January, 1853, when the tender mentioned in the case was made. In the interim various calls had been made, viz. a call of 1l. per share on the 7th of June, 1849, another of 1l. per share on the 15th of August, 1850, and another of 10s. per share in April, 1851. At a general meeting on the 31st of March, 1851, the plaintiff's shares were declared forfeited; and on the 15th of May, 1852, the notice of that forfeiture was served in the manner stated in the case. There are cases in equity which show, that, after slumbering on his rights, a shareholder whose shares have been forfeited in his absence will not be allowed to come in and claim a share in profits when the concern becomes prosperous. *Prendergast v. Turton*, 1 Younge, C. C. 98, is very much in point. In February, 1825, a joint stock company was established for the purpose of working a mine, the capital of which was to consist of 200 shares of 50l. each. The directors had power to exact the full payment of 50l. on each share, but, if further aid were required, then they were to call a meeting of proprietors, and submit to their decision the propriety of *increasing the number of shares*, or of *taking such other steps as might appear advisable*. The plaintiffs, who were shareholders, paid the full amount of their calls; but, in October, 1826, were informed by the secretary of the company that he had some time since mentioned to a person who was the plaintiffs' agent for payment of their calls, that, in the previous July, the directors had resolved to increase the amount of calls on each share. To this the plaintiffs *476] objected, and they refused to pay the additional calls. *An altercation by letter ensued till about August, 1828, when the plaintiffs, as they alleged, left the country. In July, 1828, their shares were declared forfeited. The other shareholders then continued to work the mine, but the concern was unsuccessful till the year 1835, when it began to make an increasing profit. In November, 1837, the plaintiffs, as they alleged by their bill, returned to this country. In

purge the forfeiture, then the shares still belong to the plaintiff, and he is not entitled to recover their full value,—a recovery in the present action for breach of duty not having the effect of changing the property in the shares."

September, 1838, they filed their bill to be let into the receipt of the profits with the other shareholders. It did not appear in evidence whether the plaintiffs were absent from this country, or where they were, between August, 1828, and November, 1837, except that it was admitted by the defendants that in 1828 they were in Jersey. Many acts of irregularity and misconduct in the management of the concern during the interval were admitted by the defendants, and, amongst others, the fact, that, during a great portion of that period, the concern was managed by an insufficient number of directors. The plaintiffs had no means, under the deed of settlement, of dissolving the society. It was held by Vice-Chancellor Knight Bruce, that the plaintiffs, not having sufficiently accounted for their acts and conduct during the interval between August, 1828, and November, 1837, must be considered as having acquiesced in the conduct of the directors and other shareholders in the concern, and were not entitled to the relief sought by their bill. And this decision was affirmed, on appeal, by Lord Lyndhurst, C.—13 Law Journ. Ch. 268,—who, in giving judgment, said,—“The plaintiff, who had remained quiet from the year 1828, and who knew that additional funds were necessary to carry on the works, but who had refused to pay the additional calls, and had made no offer to contribute in any way towards the expenses of the concern, or take any steps to enforce his claim during the period of adversity, finding the prospects of the company had *at length improved, and the balance had turned in their favour, [*477 claimed his share in the profits, offering then for the first time to contribute his proportion of the expenses. On the company refusing to comply with this demand; the present bill was filed; and the question is, whether, under these circumstances, the suit can be entertained,—whether a court of equity will sanction and lend its aid to such a course of proceeding.” “The question is, whether, in a precarious business of this nature, a party lying by, and lending no aid to the concern in its declining state, nor taking any steps to enforce his asserted right, can, on a return of prosperity, and when the risk is over, be allowed to come forward and urge a claim to share in the profits of the adventure. The reasonable inference, and indeed the only inference to be drawn, and to be fairly drawn, from the evidence, and from the conduct of the plaintiff, is, that he would never have advanced his claim, if the affairs of the company had continued in an unfavourable state. This court can never sanction this sort of conditional acquiescence. To allow the party to lie by, in a case of this nature, to watch the course of events,—to urge his claim, if it should be to his advantage to do so, and to abandon it on a continuance of misfortune and loss, which, as a proprietor, he must have shared, would be at variance with the plainest rules of justice.” [WILLIAMS, J.—The real question there seems to have been whether the court would relieve the plaintiffs against a forfeiture.] There was no clause of forfeiture. It was treated as an abandonment.

[JERVIS, C. J.—The question of forfeiture was discussed. The plaintiffs disputed it, but seem ultimately to have acquiesced in it. Fresh funds were raised, and then the plaintiffs prayed the aid of the Court of Chancery. WILLES, J.—In that case, all rested in contract: here, the question turns upon the construction of the statute.] It is clear here, *178] as there, that no claim *would ever have been made if the shares had not risen in value. The language of the 14th section of the act of parliament, 6 G. 4, c. xxxix., is perfectly plain and unambiguous. It enacts, “that, if any subscriber, or any proprietor or proprietors of any share or shares in the capital stock of the said company, his, her, or their executors, administrators, successors, or assigns, shall neglect or refuse to pay his, her, or their part or portion of the money to be called for by the directors as aforesaid, during the space of three calendar months next after the time appointed for payment thereof, together with lawful interest from the time appointed for payment, then and in every such case *the person or persons so neglecting or refusing shall absolutely forfeit all his, her, or their share or shares in the capital stock of the said company, and all profits and advantages thereof, and all money theretofore advanced by him, her, or them on account thereof, to and for the use and benefit of the said company.*” If the clause had stopped there, no doubt could possibly have arisen. It then goes on,—“and all shares which shall or may be forfeited or shall or may at any time or times thereafter be sold at a public sale, for the most money that can be gotten for the same, and the produce thereof shall go to and make part of the capital of the said company,”—limiting the mode in which the company are to deal with forfeited shares. Stopping there again, the construction would be free from difficulty. Now come the material words that are relied on by the plaintiff as a qualification of the previous part of the section:—“But no advantage,”—meaning, it is submitted, “no *such* advantage,”—“shall be taken of such forfeiture of any share or shares until after thirty days’ notice shall have been given by the directors of the said company, under the hand of the clerk of the said company, to the owner or owners thereof, by notice in writing *179] left at his, her, or their usual or last place of *abode, nor unless the same shall be declared to be forfeited at some general or special general meeting of the said proprietors which shall be held not earlier than three calendar months next after the said forfeiture shall happen; and that every such forfeiture so to be declared shall be an absolute indemnification and discharge to and for the proprietor and proprietors, and his, her, or their executors, administrators, successors, and assigns, so forfeiting, against all actions, suits, and prosecutions for any breach of contract or other agreement between such proprietor or proprietors, his, her, or their executors, administrators, successors, and assigns, and the said company, with regard to the future carrying on and managing of the said company.” [CRESWELL, J.—Of what is the

party to have notice?] Not of the default; not of the forfeiture. The statute makes the non-payment of calls the act of forfeiture. [JERVIS, C. J.—The act of parliament says that the notice is to be given to the “owner or owners:” but, according to your construction, it would be “the *late* owner.”] The word “owner” there is mere descriptio personæ. Suppose no notice given. Suppose, as occurred in this very case, a shareholder, after default made, goes abroad, and remains abroad until long after advantage has been taken of the forfeiture of his shares by declaration of forfeiture in the manner prescribed by the act, and then returns to this country in affluent circumstances,—could the company compel him to pay the calls? Would it not be an answer for the party to say,—“My shares were forfeited by reason of the non-payment of calls, and you, the directors, at a general meeting held more than three months after such non-payment, took advantage thereof, and declared my shares forfeited.” The true construction of the 14th section is this,—If default be made in payment of calls at the appointed time, and if at a general meeting held not earlier than three months next *after such default the shares are declared to be forfeited, the forfeiture is complete; but, before the directors can take advantage of such forfeiture by sale of the shares and appropriation of the proceeds to the capital of the company, they must give thirty days’ notice. The words of this clause differ in a remarkable manner from the corresponding provision in the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.(a) [WILLIAMS, J.—To warrant your construction, you must make out that the forfeiture is complete, not only without the thirty days’ notice, but without a declaration of forfeiture.] It is the non-payment of calls that creates the forfeiture, according to the plain words of the act: but, in order to enable the directors to sell the forfeited shares, and to protect the owner,—the former owner,—there must be a declaration of forfeiture by a general meeting. This construction makes the whole clause consistent. If the legislature had intended to make the giving of notice a condition precedent, nothing could have been more easy. [CRESSWELL, J.—When shares are “forfeited” by non-payment, what is to be done with them?] They may be sold. [CRESSWELL, J.—Immediately?] No: the forfeiture must first be declared at a general meeting to be held in the manner pointed out. [CRESSWELL, J.—And, when that has taken place, what happens?] After declaration, and before sale, the company must give the thirty days’ notice. [CRESSWELL, J.—What becomes of the shares in the mean time? or supposing no notice is given?] They are forfeited; but the company cannot sell them. It may be that the original owner or proprietor may, with the consent of a general meeting, be restored to his original position. [CRESSWELL, J.—If the shares are absolutely forfeited, what power is there afterwards to let the party in?] There

*481] certainly *is none. [CRESSWELL, J.—If the clause is construed as operating an inchoate forfeiture only until the notice is given, the whole becomes consistent.] By the Companies Clauses Consolidation Act, 1845, the directors are to sell only to the extent of arrears and interest; (a) and there is an express provision for letting in the shareholder again upon making good his default. (b) [CRESSWELL, J.—Is it not taking advantage of the forfeiture, to prevent the party from having the benefit of his shares?] Not under this act of parliament, it is submitted. In *Giles v. Hutt*, 3 Exch. 18,† 5 Railw. Cas. 505, where the directors, having power at their election to declare shares forfeited or to sue for calls, had brought an action, a subsequent declaration of forfeiture was held to be altogether unauthorized and inoperative. If Mr. Cockerell had been sued for calls upon these shares, is it not clear that he might have set up the forfeiture as an answer to the claim? [JERVIS, C. J.—Possibly that may be so. Suppose you hold a farm under me, and give me notice to quit, and I act upon it? WILLIAMS, J.—Take the common case of a lease, with a clause of forfeiture for non-payment *482] of rent within twenty-one *days of the quarter-day, and the landlord gives the tenant notice that he will take advantage of the forfeiture, and, when the next rent-day comes, brings an action for the subsequent quarter's rent,—could the tenant set up as an answer that the lease was forfeited? *Unthank* referred to *Jones v. Carter*, 15 M. & W. 725,† where it was held that the service by a lessor upon the lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken, after the service of the declaration.] The same point was decided in *Doe d. Morecraft v. Meux*, 1 C. & P. 848 (E. C. L. R. vol. 12). The case put by Mr. Justice Williams would be more like this, if, instead of merely telling the tenant that advantage would be taken of the forfeiture, the landlord had done an act, viz., served the tenant with a writ of ejectment. In order to show Mr. Cockerell completely indemnified, nothing more than the forfeiture and the declaration thereof need be proved. [JERVIS, C. J.—Suppose a not uncommon case,—a proviso that a lease shall be forfeited for non-payment of rent, or non-repair, but that such forfeiture shall not be taken advantage of until three months' notice has been given.]

(a) "The company shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest and the expenses attending such sale and declaration of forfeiture; and, if the money produced by the sale of any forfeited shares be more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and sale thereof, the surplus shall, on demand, be paid to the defaulter." s. 35.

(b) See the 8 & 9 Vict. c. 16, s. 36, which provides, that, "if payment of such arrears of calls and interest and expenses be made before any share so forfeited and vested in the company shall have been sold, such share shall revert to the party to whom the same belonged before such forfeiture, in such manner as if such calls had been duly paid."

In that case, there would be no default until a failure to perform the covenant within the time limited by the notice. [JERVIS, C. J.—I must confess I think the meaning of the clause clearly is this,—The shares are to be forfeited for non-payment of calls; but the company, on the one hand, shall not derive any advantage from the forfeiture, nor shall the shareholder, on the other hand, be in any respect damnified thereby, until there has been a declaration of forfeiture at a general meeting, and a thirty days' notice.]

The next question is, whether, assuming a notice to be essential to operate a forfeiture, a notice has been *sufficiently served. And, first, as to the place. "Austin Friars" is the only address of [*483 Mr. Cockerell that ever appears with reference to this company. He so describes himself in a deed executed by him so late as the 24th of November, 1848, which was long after the firm of Cockerell, Larpent & Co. had ceased to carry on business there. [CRESSWELL, J.—What is that to you? JERVIS, C. J.—I am inclined to think that "Austin Friars" was the plaintiff's "last place of abode," so far as regards this company.] It appears that Mr. Coleman, the accountant employed to wind up the concerns of the firm, attended at that place, with Mr. Noble, one of the members of the late firm, until some uncertain time, but prior to the date and delivery of the notice; and then a board is affixed, the premises being shut up, directing that "letters and communications for Cockerell, Larpent & Co.," are to be left at Mr. Coleman's. Accordingly the notice is sent to Coleman. To whom or where else could it be sent? [JERVIS, C. J.—It does not appear what authority Coleman had to put up that board: and, further, it only professes to deal with communications addressed to *the firm*, not to those addressed to individual members of the firm.] If Austin Friars was the place of abode, either actual or constructive, of Mr. Cockerell, and he absents himself, and the place is shut up, and such a direction affixed thereon, surely it is not too much to say that he impliedly authorizes the person who has the winding up of the affairs of the firm to give a new direction to communications addressed to him there. [JERVIS, C. J.—The case states that Coleman had no authority from the plaintiff to put the board up, and no authority to deal with private documents of the plaintiff.] He had, it is true, no *express* authority. But the court are at liberty to draw inferences. [JERVIS, C. J.—There is nothing here that would warrant a jury in inferring that he had any authority. *CRESSWELL, J.— [*484 The letter enclosing the notice shows that the parties serving the notice knew very well that Coleman was not the proper person to acknowledge the service. That is the only inference I can draw from the letter.]

JERVIS, C. J.—There must be judgment for the plaintiff. The only remaining question is, as to how the damages are to be computed.

Hugh Hill.—The evidence upon the subject of value is to this effect,—

that the market-price of the shares on the day of the tender was 20*l.*; that, between that time and the day of the trial, it fluctuated, varying from 13*l.* to 26*l.* 10*s.*; and that, at the commencement of the action, the value was 14*l.* 10*s.*: and now the market-price is 17*l.* per share.

Montague Smith.—The verdict was taken for 8000*l.*, which was calculated in this way,—The shares were worth 20*l.* each at the time of the tender, and the amount due for calls and interest was 800*l.* But the Lord Chief Justice suggested, that, if so many as two hundred shares were thrown upon the market at once, they would probably not have realized 20*l.*; and, adopting that suggestion, it was agreed that the value should be taken at 19*l.* The case of *Owen v. Routh*, 14 C. B. 827 (E. C. L. R. vol. 78), was referred to.^(a)

*485] *Hugh Hill.*—It must be borne in mind that the *judgment in this case will not divest the shares out of Mr. Cockerell. That must be provided for by the rule.

After some considerable discussion, it was ultimately arranged that the price of the shares should be taken at 17*l.* each; and the following rule was drawn up:—

“Judgment for the plaintiff: And it is further ordered (the same to be without prejudice to error being brought) that the plaintiff’s damages be entered for 2600*l.*; the plaintiff, by his counsel, undertaking to execute such conveyance as may be necessary to vest the shares in any party to be named by the defendants.”

(a) In that case it was held, that the true measure of damages in an action for not redelivering shares lent to the defendant upon a contract to return them on a given day, is, not the market-price at the time of the breach, but the market-price at the time of the trial. See *Shaw v. Holland*, 15 M. & W. 136;† *Peterson v. Ayre*, 13 C. B. 353 (E. C. L. R. vol. 76); *Fletcher v. Taylor*, 17 C. B. 21 (E. C. L. R. vol. 84).

PATIENCE SWINFEN v. FREDERICK HAY SWINFEN.

June 11.

To sustain an attachment for disobedience of a rule of court requiring the party to execute a conveyance, it is not enough merely to serve him with a copy and to show him the original rule: there must be an express demand upon him to do the act which the rule commands him to do.

This court may issue an attachment for disobedience of a rule drawn up on an order of *Nisi Prius* made at the trial of an issue directed by the Court of Chancery.

The court will not inquire into the authority of counsel to agree to a compromise of a cause at *Nisi Prius*.

On the 15th of March, 1856, an issue directed by the Master of the Rolls, by an order dated the 30th of July, 1855, made in a suit in Chancery of *Swinfen v. Swinfen*, to try the validity of the will of one Samuel Swinfen, deceased, came on for trial before Cresswell, J., and a special jury, at the assizes at Stafford. At the close of the first day

of the trial, negotiations for an arrangement took place between the leading counsel for the respective parties, and ultimately the following terms were finally agreed upon and embodied in a *memorandum, which was signed by them in the presence of the attorneys on both sides, in the following terms:—

“Terms of compromise. Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of encumbrance, if any, created since death of Samuel Swinfen; such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity for her life on the estate of 1000*l.* a year, inclusive of the 300*l.* a year already secured to her on estate, also to date from Michaelmas, 1855. If any charge is existing on the estate created prior to the death of Samuel Swinfen, the interest to be borne in equal moieties. Plaintiff’s costs as between attorney and client, not exceeding 1250*l.*, to be paid by defendant. Power to either party to make this agreement a rule of court. In event of any question arising on the above terms, the same to be referred to Sir F. T. and the Attorney-General. The house and grounds to be occupied by plaintiff, without payment of rent, till Michaelmas next.”

This memorandum was embodied in an order of Nisi Prius, which was afterwards made a rule of court.

On the 24th of March, 1856, the attorneys for the defendant wrote to Mr. C. Simpson, of Lichfield (who was the solicitor for the plaintiff in the suit, and her attorney in the issue, and who attended the trial), as follows:—

“Sir,—To enable us to give counsel the necessary instructions for carrying out the compromise, we ought to have a copy of the mortgage to the late Mr. Swinfen’s trustees of the property: we believe no reconveyance was ever executed. We should like also to have a list of the deeds relating to the property: will you be good enough to supply us with such copy and list at your early convenience? We shall also be obliged by your letting us have the account of the personal property of the late Mr. Swinfen as early as you can.”

*On the 31st of March, the defendant’s attorneys again wrote to Simpson, as follows:—

“We have written to you twice on this subject, and have not been favoured with any reply. We understand from Messrs. Cole (the London agents) that your client intends, if she can, to evade the performance of the agreement entered into by her for the settlement of the question in dispute. Unless we hear from you satisfactorily by return of post, we shall assume that such is her intention and yours, and we shall act accordingly.”

On the 1st of April, Mr. Simpson wrote to the defendant’s attorneys as follows:—

“Gentlemen,—Swinfen, deceased. In reply to yours, received to—

day, I should have thought the more natural course would be to assume the due performance of the agreement until you had notice to the contrary, rather than write 'Unless I hear from you satisfactorily by return of post, we shall assume that it is your intention to repudiate it, and act accordingly.' Acting accordingly means further litigation, I presume. I might not have received your letter to-day; yet, according to your threat, you would have resumed hostilities to-morrow. I notice your assertion that you understand the intention of Mrs. Swinfen from Messrs. Cole, merely to remark that I do not believe those gentlemen have given you such information. I have never expressed an intention to resist the agreement, and have received no instructions to do so. I had no concern in the arrangement of the compromise, except to object to it; nor had Mrs. Swinfen: it was made against her positive directions; and I have not hesitated to speak of it in the strongest terms of disapprobation. That it was a great wrong on one side or the other, is conceded by all whose opinion is worthy of attention. Of course, if Mrs. Swinfen instructs me to resist the course of action on the agreement, and if she *488] should be well advised to do so, I am *at liberty to follow her instructions; and I will in that case give you the earliest possible notice: but, in the mean time, I must protest against inventions, and request you to refrain from communicating to me statements imputed to my agents. I do not know who are your agents here, and therefore I have no means of reciprocating this Metropolitan recreation."

In reply to this letter, the defendant's attorneys, on the 2d of April, wrote to Simpson as follows:—

"Sir,—Swinfen, deceased. We have received your letter of yesterday, and are extremely sorry that the evasive manner in which you think proper to treat our communications makes it clear that we cannot, with any regard to the interests intrusted to us, continue our endeavours to conduct business with you, except under the support of a court of justice. We must, therefore, proceed as we may be advised, to compel you to deal seriously and properly with this matter; and you will recollect that the amount we are to pay for costs is limited, and that further costs rendered necessary by your misconduct will fall on your client."

On the 16th of April, the defendant's attorneys again addressed Simpson as follows:—

"Sir,—Swinfen v. Swinfen. It is probably superfluous; but we think it right to inform you, that, as you have taken no step to supply us with the information requisite to enable us to proceed to carry out the agreement for settlement of the matter in dispute in this cause, which we requested you on the 24th ult. to furnish us with, counsel is now instructed to prepare a supplemental bill for enforcing the agreement; and we shall seek to throw the costs thereof upon your client."

On the 18th of April, Simpson wrote the defendant's attorneys as follows:—

"Gentlemen,—Mrs. Swinfen. I have received your *letter of the 16th, and forwarded it to Mr. John Cole, as I did the preceding one, in which you announced your intention to apply to some court on some pretext or other. Probably you may be able to correspond with Mr. Cole to a more useful purpose and with more despatch than with me. I have referred to your letter of the 24th ult., without being able to discover which mortgage you inquire after."

The defendant's attorneys afterwards had an interview with Mr. Cole, Simpson's London agent, with reference to the matters in question, and on the 29th of April wrote to him, as follows:—

"Dear Sir,—Swinfen. Your explanation as to the deeds for which you applied to Mr. Dendy is satisfactory. Mr. H. is proceeding with the bill against Mrs. H. Swinfen for enforcing the agreement. We think it, however, much to be regretted, that, where there is now no room for question, further litigation should take place. We want to know,—first, whether Mrs. H. Swinfen will or will not carry out the agreement,—secondly, if she will, we want to be furnished with the abstract of title, showing the existing encumbrances on the estate, and present position of the title, to enable us to prepare the conveyance according to the agreement. Thirdly, I want to settle with you what land Mrs. H. Swinfen is to occupy under the agreement, as she holds certain arable and pasture land, and the woods and lake, besides the house and grounds," &c.

On 28th of April Mr. Cole informed the defendant's attorneys that he had forwarded a copy of their letter to Simpson; and on the 1st of May he (Cole) wrote to them, as follows:—

"Dear Sirs,—Swinfen. I have received from Mr. Simpson the views of Mrs. Swinfen on your last letter, so far as regards the arrangement made by counsel at the Stafford Assizes; and the substance is, that she is *not disposed to carry out the terms thereof, on the ground of the arrangement having been made, not only without her sanction, but directly in opposition to her wishes. Under these circumstances, I conclude you will have to bring the matter before the court in such way as you may be advised."

Upon affidavits setting out the above facts, and stating, that Mrs. Swinfen was on the 21st of May served with the rule of court, but that she had not hitherto complied with it, nor had the deponent (defendant's attorney) received any communication whatever from her attorney or agent, or any person on her behalf, that she intended to comply with it, or in any manner retracted the positive refusal to carry out the agreement, contained in the letter of Mr. Cole of the 1st of May, 1856; that none of the deeds relating to the title of the Swinfen estate were in the deponent's possession or in that of the defendant; that the deponent believed them to be in the possession of the plaintiff; and that, in consequence of Simpson's not sending him the information required of him,

the deponent was unable to prepare the conveyance of the Swinfen estate to the defendant, as directed by the rule, or to take any step in relation thereto,

The Attorney-General, on the 5th of June instant, obtained a rule calling upon Mrs. Swinfen to show cause why an attachment should not be issued against her for disobedience of the rule of court.

Watson and W. R. Cole now showed cause, upon the affidavits of Mrs. Swinfen, and of her attorney, Mr. Simpson.—Mrs. Swinfen's affidavit was as follows:—"1. That this was a feigned issue from the Court of Chancery, directed by the Master of the Rolls, and not an action; that the Swinfen estate devised to me by my father-in-law, Samuel Swinfen, *491] deceased, is of the value of more than *60,000*l.*, and I had a charge upon such estate of 300*l.* a year for my life under a deed executed by the said Samuel Swinfen, and also my late husband's will; that an additional charge of 700*l.* per annum on the said estate for and during my life is of the value of about 10,000*l.*; and that the effect of the compromise alleged to have been made at the trial would be, to deprive me of property of the value of about 50,000*l.*, which I consider a great injustice.

"2. That the trial of this issue commenced on the afternoon of Saturday, the 15th of March last, before Cresswell, J., and a full special jury; and, if it had been fully heard and tried, it would probably have occupied the whole of the following Monday and Tuesday, and very likely the Wednesday.

"3. That my case was opened, and myself and five of my witnesses were examined on Saturday; after which the court rose, and adjourned to the following Monday; but many more of my witnesses (including the three attesting witnesses to the will) then remained to be examined on my behalf.

"4. That, on Saturday evening, after the rising of the court, my leading counsel, Sir F. Thesiger, sent for me to his lodgings at Stafford, and there communicated to me personally a certain proposal for a compromise, which had been made to him by the Attorney-General on behalf of the defendant: that I should without hesitation have rejected such proposal at once, but thought it more respectful to counsel to take time to consider, and therefore promised to send an answer to Sir F. Thesiger on the next day (Sunday): that, accordingly, after consulting my friend and relative Sir H. Durrant, and other friends then staying at my house, I determined to reject the proposal; and the next day I *492] caused a message to be delivered to Sir F. Thesiger, that the *proposal was rejected; and such message was duly delivered to Sir F. Thesiger about or shortly after one o'clock on Sunday.

"5. That, after the interview with Sir F. Thesiger on Saturday evening, I returned to my residence at Swinfen Hall, which is about 20 miles distant from Stafford; and, on the following Monday morning I

returned to Stafford by the first train, with Sir H. Durrant and several of my witnesses, to attend the trial; but, on my arrival in court, I met Sir F. Thesiger, who was leaving, and who, addressing me, said, 'It is all settled: it is compromised: I have done the best for you,' or words to that effect, whereupon my friend, Sir H. Durrant, asked, 'By whose authority?' to which Sir F. Thesiger replied, 'Yours;' whereupon Sir H. Durrant denied any such authority, and Sir F. Thesiger then left me; and I am informed, and believe, that my attorney (Mr. C. Simpson) expressly declined to consent or concur in the proposed compromise, and stated to Sir F. Thesiger that he had no authority so to do; and that Sir F. Thesiger took upon himself the responsibility, 'jointly with the other counsel engaged on my behalf,' of consenting to the proposed compromise: and I say that the alleged compromise was in the material points the same as the said proposal which I had rejected, but with additional stipulations more unfavourable to me.

"6. That I have never since ratified or adopted, or in any manner assented to, the said arrangement; and, on the other hand, *I have never refused to do any act in obedience to the rule of court, nor, indeed, have I ever been personally requested to do any particular act.*

"7. I submit to the court whether it would not be more just and reasonable to leave the defendant to enforce the supposed agreement by proceedings in equity (as threatened by the defendant's solicitors), *rather than by an attachment issued out of this court; especially as this was only a feigned issue directed by the Court of [*498 Chancery.

"8. That the modern title-deeds of the Swinfen estate before the said trial and ever since have been and are in the possession of Mr. S. Holmes, on behalf of certain trustees entitled to the custody thereof, and the same have not since the said trial been in my possession or power; but some of the ancient title-deeds of the estate are in my possession, and I have never been required to produce the same."

Simpson's affidavit stated, that the first proposal of a compromise of the cause was made to the plaintiff after the adjournment of the court on the 15th of March, and was the same in substance as the compromise which was afterwards agreed to by counsel, and made an order of the court; that the deponent received the proposal in the first instance from Sir F. Thesiger, counsel for the plaintiff, and he at once declined to communicate it to the plaintiff, whereupon he was requested by Sir F. Thesiger to send the plaintiff to his lodgings, which he did, but he did not accompany her; that, on the following day, the deponent communicated, at the plaintiff's request, her refusal of the proposal, to Mr. Cole, his agent, who made it known, in writing, to Sir F. Thesiger soon after one o'clock; that the deponent had no authority from the plaintiff to reconsider the offer, but, at the request of Sir F. Thesiger, he waited upon him, with Mr. Cole, his agent, before the opening of the court on

the following day (Monday), and he then informed him on what basis he would undertake to negotiate with the defendant, which, to the best of his recollection and belief, he gave to him in writing, and that it was altogether different from the former proposal, and the present alleged agreement, inasmuch as it secured a life estate in the property devised *494] to the *plaintiff; that, some time after the opening of the court, the deponent was informed of the terms then under discussion between the defendant and his counsel and Sir F. Thesiger; that he then told Sir F. Thesiger that he had no authority to assent to them, and that he could not be concerned as the plaintiff's attorney in what was going on, and disapproved thereof; but that Sir F. Thesiger said, in reply, he would take all the responsibility upon himself jointly with his colleagues; and that, as the discussion between counsel continued a long time, the deponent requested Sir F. Thesiger to wait for the arrival of the plaintiff from Swinfen; but that a juror was withdrawn a few minutes before she reached the court.

1. There is no ground for an attachment in this case. It is true that the order of *Nisi Prius* has been made a rule of court, and that that rule of court has been personally served upon Mrs. Swinfen. But it is not shown (and the practice of the court requires that it should be shown) that there was any demand made upon the lady to do any specific thing. Where the rule of court the obedience to which it is sought to enforce by process of attachment, is for the payment of money, there must be a specific demand of payment. If a conveyance is to be executed, a deed must be prepared, and tendered for execution. Here, the service of the rule is thus sworn to,—“I, J. B., of, &c., make oath and say that I did on the 21st day of May instant personally serve the above plaintiff, Patience Swinfen, with the rule hereunto annexed, by delivering a true copy of the said rule to the said Patience Swinfen personally, at, &c., and at the same time showed to the said Patience Swinfen the said original rule,”—and no more. The other affidavit upon which the rule was moved merely details a correspondence between the defendant's attorney and Mr. Simpson, and his London agent, with which the *495] *plaintiff appears to have had nothing whatever to do. In *Doe d. The Earl of Cardigan v. Bywater*, 7 C. B. 794, an order was made by consent, in an action of ejectment, “that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and *the lessor of the plaintiff* to pay 5*l.* towards the defendant's costs, and to grant a lease of the premises for twenty-one years, at the rent of 1*s.* a year, on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish were held:” the defendant having declined to accept a lease and execute a counterpart,—the court refused to grant an attachment against him; Wilde, C. J., saying,—“I have always understood that an attachment for contempt goes only where the party has been called upon to do, and has wholly

omitted to do some specific act. Such motions occur the most frequently in cases of awards. The direction contained in the award becomes, upon the award (a) being made a rule of court, in effect, the direction of the court. But the court always takes especial care to see that the award is express and distinct in directing the particular matter to be done, before it will attach the party for disobedience of it. The same strictness is usually observed by the court, in enforcing performance of its own ordinary rules. The party in the present case is sought to be attached for not accepting a lease of certain premises, and executing a counterpart. Referring to the judge's order, I do not find that it directs him to do either of these things." [CRESSWELL, J.—There was a very good reason for not attaching the party there: the rule of court did not command him to do that for the not doing of which the attachment was prayed against him.] Mrs. Swinfen was not asked to do any specific act when served with the rule. She was not asked to execute a conveyance; nor was any conveyance tendered to her for execution. [CRESSWELL, J.—This last was not *necessary, according to a case to which my Brother Willes has referred me.] In *Dodington v. Hudson*, 1 Bing. 410 (E. C. L. R. vol. 8), 8 J. B. Moore, 510 (E. C. L. R. vol. 17), where the defendant was served with an order of court to reinstate forthwith premises belonging to the plaintiff,—it was held, that an attachment could not issue against him for disobedience of the order, unless the service of it was accompanied with an oral demand of performance. Gifford, C. J., there says: "The party moving for an attachment should have requested the defendant to set about the work, and he might then perhaps have alleged some excuse for not proceeding to immediate performance." And Burrough, J., said: "This being a criminal proceeding, wilful disobedience of the order of the court must be established before an attachment can issue." (b) [CRESSWELL, J.—Does not the affidavit disclose enough to dispense in this case with such oral demand?] Assume that Mrs. Swinfen had said before she was served with the rule of court that she would not execute the conveyance, would that make her guilty of a contempt by relation? [CRESSWELL, J.—It would not be a contempt by relation: but it might be a continuing refusal.]

2. This is not a proceeding in which an attachment ought to issue. [CRESSWELL, J.—Why not? The rule is a rule of this court.] True: but it is a rule made, not in an ordinary action, but in furtherance of an arrangement made upon the trial of an issue directed for the purpose of informing the conscience of the court which has seisin of the suit, viz., the Court of Chancery. This is a proceeding in which the parties could not pray a tales,—*Wood v. Thompson*, 1 Car. & M. 171; in which no writ of error could be brought,—*King v. Simmonds*, 7 Q. B. 289, 312 (E. C. L. R. vol. 53); *Thorpe v. Plowden*, 2 Exch. 387;† nor a bill

(a) The "order of reference," or "submission."

(b) See *Doe d. Williams v. Howell*, 5 Exch. 299.†

of exceptions,—*Lewis v. Armstrong*, 3 Mylne & K. 52; nor an amendment at Nisi Prius under the *3 & 4 W. 4, c. 42, s. 23,—James v. *497] *Lynn*, 13 Q. B. 845 (E. C. L. R. vol. 66), or special entry on the record under s. 24,—*Brown v. Hutchinson*, 13 Q. B. 185 (E. C. L. R. vol. 66); and in which judgment is not entered up as in an ordinary suit,—*Dickenson v. Eyre*, 7 Q. B. 307, n. (E. C. L. R. vol. 53). The sole remedy is by application to the court by which the issue is directed. Suppose the court were to grant an attachment; there is no appeal: and suppose the Court of Chancery should think the agreement entered into at Nisi Prius not a binding obligation between the parties: there might be conflicting decisions. It is manifest that the Court of Chancery, which has complete control over the whole proceedings, is the proper tribunal to dispose of this question. That court alone could order a new trial. [CRESSWELL, J.—That was so formerly, but not now: the writ is issued out of this court: see 8 & 9 Vict. c. 109, s. 19.] The books of practice lay it down that it is so still: see *Archbold's Practice*, 11th edit., by Prentice, 843. [CRESSWELL, J.—I doubt that.(a)]

3. Then, will the court, by granting an attachment, preclude the plaintiff from contesting the propriety of an engagement entered into by counsel without her authority or assent, and in direct defiance of her instructions? Will they not rather leave the defendant to his remedy by action, or by motion for a specific performance; in either of which cases there would be an appeal? In *Thomas v. Hewes*, 2 C. & M. 519,† in an action of trespass, A. was plaintiff, and B. (C.'s land agent) was the nominal defendant, C. being the person really interested. H., who acted as the defendant's attorney, upon the employment of C., and who also acted as C.'s attorney in certain actions and suits depending between C. and A., consented to an order of Nisi Prius, on the terms that A. *498] should give up *to C. the possession of the farm on which the trespass had been committed, and that proceedings should be stayed in the actions and suits between A. and B. and C., and that C. should pay the taxed costs in the present action, and the further sum of 10*l.* to A. On motion to set aside the order of Nisi Prius, and a rule of court made thereon, upon the ground that H. had no authority to bind C. by any such arrangement, the court refused to interfere in a summary way. Bayley, B., in giving judgment, said: "It is not at all necessary in this case to lay down any general rule as to the authority of attorneys or counsel to bind their clients: but the case before us may be decided upon the nature of the application. This was an action brought by Thomas against Hewes and others, which was arranged at Nisi Prius after great consideration and able legal advice. *I do not proceed on the ground of the counsel having been parties to the arrangement, as they might have had no right to bind Lord Falmouth*; but the circum-

(a) The authorities cited for the position in *Archbold* are all anterior to the 8 & 9 Vict. c. 109.

stance of their being consulted shows that the agreement was entered into after due consultation and consideration. The parties agree upon certain terms, and, according to the order of *Nisi Prius*, Lord Falmouth, 'by his attorney,' consents to become a party to the arrangement. The order does not describe Mr. H. as the attorney for Lord Falmouth in the suit, but generally; and the present application is made to set aside the order of *Nisi Prius*, on the ground that Lord Falmouth had given his attorney no authority whatever to enter into this arrangement, and therefore that he is not bound by what his attorney did. If we were to set aside this order, we should decide conclusively on this question. We should determine whether an attorney has a general authority to bind his client in such a case, and whether Mr. H. in this instance had the authority of Lord Falmouth, and we should obstruct the course of the constituted tribunal by which this question ought to be tried, if we were to do so. I know of no authority which gives us power [*499 to set aside the agreement of the parties at *Nisi Prius*. The statute of William(a) certainly confers none. I do not know of any instance of the court interfering in a summary way to set aside such an order; and, in this instance, if we were to do so, we should work great injustice, as it is impossible to restore the plaintiff to the situation he was in before. The order has been made a rule of court, and on that ground we are applied to for our interference; *but it is a different question whether we shall enforce the order by process, or leave the party to his action.* If a *distringas* is applied for against Lord Falmouth, he may show that he has given no authority to his attorney to enter into this arrangement; and, if so, it is probable that the court would decline granting a *distringas*, and leave the plaintiff to his remedy by action, by which means it would then be a question for a jury to determine whether Mr. H. had Lord Falmouth's authority to do what he did in his name, and as he thought for his benefit. *If we were to interfere in this summary way, we should be preventing the parties from taking the opinion of a jury on the facts, and of a court of error on the law.*" Another reason why the matter should be dealt with by the Court of Chancery, is, that in Chancery the solicitor has a less extensive power and control over the suit than the attorney has at law: *Colwel v. Sir William Child*, 1 Ca. Ch. 86. [CRESSWELL, J.—Is that because he does not appear upon the record? In a recent case, *Mole v. Smith*, 1 Jac. & W. 673, Lord Eldon held the counsel's power to consent for his client to be absolute. He says: "It is for Mr. Shadwell to consider whether he is authorized to give his consent for the widow. If he does, I must act upon it; and she will be bound by it."] *That was no deliberate decision, [*500 but a mere expression of opinion in the course of the argument. [CRESSWELL, J.—Do you contend that counsel at *Nisi Prius* have no power to bind their clients by arrangements such as this?] I do.

The Attorney-General and Whateley, in support of the rule.—The rule in equity as to the authority of counsel is unquestionable. In *Furnival v. Bogle*, 4 Russ. 142, it is distinctly laid down that a party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. The principle that parties are bound by the consent of their counsel has been recognised in a late case,—In *re Hobler*, 8 Beavan, 101,—where a motion to restore a petition dismissed by consent, upon the ground that no authority had been given to counsel to consent, was dismissed with costs; the Master of the Rolls (Lord Langdale) saying,—“The business of the court cannot proceed unless credit is given to the statements of counsel that they have authority for what they do. They must themselves judge of the extent of their authority, under the ordinary responsibilities.” Upon the general reason of the thing, it is of the last importance that causes should occasionally be settled by counsel. It would be impossible to conduct the ordinary business of the court, unless it were assumed that the counsel have the authority of the client for what they so do. [CRESSWELL, J.—The assent of the client might be wanting, even where the counsel was acting with the consent of the attorney.] This court, it is submitted, will act upon the rule wisely laid down by the

*501] Court of Chancery. The facts show that the client was an assenting party to the arrangement in this case. What passed at the trial is in the knowledge of one member of the court. [CRESSWELL, J.—I think we ought not to listen to a discussion as to whether or not the counsel had the authority they assumed to exercise. We must assume that they have not exceeded the proper bounds of their duty.] The next question is, whether or not there has been such a refusal on the part of Mrs. Swinfen to comply with the rule of court as to render her liable to be attached. Having already made two applications to her attorney for the information and the documents necessary to enable them to take steps to carry the compromise into effect, the defendant's attorneys write to him as follows,—“We understand from Mr. Cole (the London agent) that your client intends, if she can, to evade the performance of the agreement entered into by her for the settlement of the question in dispute. Unless we hear from you satisfactorily by return of post, we shall assume that such is her intention, and yours, and shall act accordingly.” To this letter the attorney for Mrs. Swinfen sends on the 1st of April an evasive reply; and a correspondence ensues from which it is impossible to draw any other conclusion than that Mrs. Swinfen and her attorney are seeking to escape the performance of the engagement solemnly entered into by her counsel on her behalf. And on the 1st of May, the agent, Mr. Cole, writes as fol-

lows:—"I have received from Mr. Simpson the views of Mrs. Swinfen on your last letter, so far as regards the arrangement made by counsel at the Stafford Assizes; and the substance is, that she is not disposed to carry out the terms thereof, on the ground of the arrangement having been made, not only without her sanction, but directly in opposition to her wishes. Under these circumstances, I conclude you will have to bring the matter *before the court in such way as you may be advised." Under these circumstances, the order is made a rule [502 of court, and she is personally served with it, and says nothing. It is true, there is nothing in the affidavits to show what passed on the occasion of the service; but that, it is submitted, under the peculiar circumstances, could not be necessary. It is impossible not to see that a demand of performance would have been fruitless. The absence of such a statement in the affidavit is accounted for by the fact of the person who effected the service entertaining an absurd scruple as to what passed between Mrs. Swinfen and himself on the occasion being confidential. As to the argument that resort should have been had to the court which directed the issue, to enforce obedience to the agreement, there is no foundation for that. [CRESSWELL, J.—On that point we need not trouble you.]

CRESSWELL, J.(a)—Several objections have been taken to this rule, which are not well founded. In the first place, it is said that the issue which came on for trial before me at Stafford, and which was put an end to by the agreement of compromise which this rule seeks to enforce, being directed merely for the purpose of assisting, or, as it is called, informing the conscience of the court of equity, any application upon the subject of it should be made to the court of equity, and not to this court. That objection it seems to me is not well founded. The writ upon which the action proceeds was issued out of this court. The record is here. And it is the process of this court that is alleged to have been treated with contempt. This court, therefore, is the proper and the only court to which in my opinion the application (b) could be made. The suggestion *that proceedings are pending in equity for the attainment of [503 the same object, fails in point of fact.(c) The next point that was made raises a most important consideration. It is said that the compromise which was entered into by the counsel for the respective parties at Stafford, was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the court cannot for a moment listen to an objection of that sort: and I am glad to find that there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her behalf assented to. I think it would

(a) Jervis, C. J., being related to the parties, took no part in the discussion.

(b) For an attachment.

(c) In one of the affidavits used in opposition to the motion, it was stated that since the order was made a rule of court proceedings had been taken in equity to enforce the agreement: but it appeared that these had been abandoned before the present rule was moved.

be most fatal to the due administration of justice, if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this: for, if the client or the attorney has reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But, if counsel, duly instructed, take upon himself to consent to a compromise which he in the exercise of a sound discretion judges to be for the interest of his client, the court will not inquire into the existence or the extent of his authority. I am extremely happy to find that the decisions abundantly bear us out in thinking this objection cannot be permitted to prevail. There is, however, another and a purely technical objection to which I regret much that I feel bound to accede, because, considering that the gentleman who represented the plaintiff on this occasion is a man of the highest talent, and unimpeachable honour, and of great experience, I feel convinced that the interests of the client have been most zealously *504] and anxiously preserved by the arrangement that was come to.

But, at the same time, it is incumbent on the court to require strict proof that its process has been treated with contempt, before it allows an attachment to issue. Mr. Cole's letter was written before the order of *Nisi Prius* was made a rule of court. There was no refusal, therefore, at that time to obey the order: and I find no case where an expression of an intention not to act upon an order, has been treated as a continuing refusal down to the time of a demand of performance. Considering, therefore, that we are here dealing with a strict rule of practice, and that this is in the nature of a criminal proceeding, I think it is not enough to show that the party has evinced a disposition or intention to evade performance of the order of the court; but that it is necessary that there should be a personal service of the rule, and a personal demand of performance, before we can hold her guilty of contempt. What passed here at the time of the service is not disclosed; the party who made the service, it appears, having an absurd scruple which induces him to decline to make an affidavit of the circumstances. Upon this ground, I am of opinion that the rule for an attachment must be discharged; but, under the circumstances, without costs, and without prejudice to any other proceeding which the defendant may be advised to take for the purpose of enforcing performance of the agreement.

WILLIAMS, J.—I am of the same opinion. There is no sufficient evidence that this lady has been guilty of a contempt of the process of the court, according to the strict rule of practice. It must be borne in mind that an attachment for contempt is in the nature of criminal process: and the importance and magnitude of the interests that are involved in the case can be no justification for deviating from the ordinary rule. Before a *505] party can be adjudged guilty of a contempt for disobedience of a rule of court, he must be personally

served with the rule, and personally required to comply with it. That has not been done here. Without pretending to define the precise limits of the authority of counsel, it is enough on the present occasion to say that I entirely concur with my Brother Cresswell in holding that Mrs. Swinfen is bound by the compact entered into on her behalf at the trial.

WILLES, J. As to the authority of counsel to bind the client by arrangements entered into in court, I agree entirely with what has fallen from my Brother Cresswell: and it is only on the ground of the want of a personal demand of performance at the time the rule was served, that I concur in thinking that this rule cannot be sustained.

Rule discharged, without costs.

HALE and Others, Assignees of the Estate and Effects of ISAAC BECK, a Bankrupt, v. JOHN ALLNUTT the Younger. *June 11.*

A., a licensed victualler, was indebted to B. in 570*l.* for goods sold and money advanced. Being pressed for payment, as an inducement for forbearance on the part of B., A., on the 5th of April, 1854, executed a deed whereby he mortgaged to him the public-house in which the business was carried on, and assigned to him all his trade and other fixtures and household furniture, with a power of sale in case of default in payment of the debt and interest by certain instalments, extending over a period of several months. The value of the property mortgaged was between 300*l.* and 400*l.* The value of A.'s assets at the time was about 1200*l.*; and his debts altogether amounted to 4000*l.* A. continued his business until the 22d of July, when he became bankrupt; having in the mean time received further supplies of goods and advances of money from B., and made various payments to other creditors:—

Held, that the execution of the deed was not an act of bankruptcy,—the assignment not being of the whole (or the whole with a colourable exception) of A.'s property, and the defeating or delaying of creditors, by producing absolute present insolvency and incapacity to carry on trade, not being its necessary result: nor was the deed void as a fraudulent preference of B., it being the result of pressure on his part, and not a voluntary conveyance on the part of A.

THIS cause came on for trial before Alderson, B., at the last Spring Assizes at Warwick, when a verdict was *found for the plaintiffs, for 206*l.* 8*s.*, subject to the opinion of the court upon the following case:—

The declaration was for money payable by the defendant to the plaintiffs as assignees of Isaac Beck, a bankrupt, for money received by the defendant for the use of the plaintiffs as such assignees. The plaintiffs claimed 206*l.* 8*s.*

The defendant pleaded never indebted, whereupon issue was joined.

The action was brought to recover the sum of 206*l.* 8*s.*, being the proceeds (after payment of expenses) of the sale by or on behalf of the defendant of the residue of a term of years in a public-house, with the good-will thereof and various fixtures therein, which Isaac Beck, the bankrupt, had before his bankruptcy (with other property) mortgaged to the defendant to secure a balance of account, but the validity of which mortgage is disputed by the plaintiffs.

Isaac Beck was a licensed victualler and wine and spirit-dealer at Birmingham. The defendant was a wholesale wine and spirit-merchant in London, dealing under the firm of John Allnutt, jun., & Co. Beck had dealt with the defendant for many years before the bankruptcy; and the nature of the dealings was, that the defendant sold wines and spirits to Beck, and from time to time advanced money to him to enable him to pay the Custom House duties upon and release such wines and spirits from the docks, interest being charged on such advances, and Beck from time to time giving acceptances on account, which were occasionally dishonoured.

In the beginning of April, 1854, Beck was indebted to the defendant in the amount of 570*l.* 15*s.* 11*d.* on a balance of account. He had applied for more goods; but the defendant had declined to supply them, and had pressed him several times for the balance. On the 13th *507] of March, 1854, the defendant wrote the following letter to the bankrupt:—

“London, 18th March, 1854.

“Sir,—We are in receipt of your letter promising to remit us the amount of Mr. Bradley’s dishonoured acceptance on the 15th instant, and which we shall expect accordingly. At the same time, we trust you will send us the amount owing for duties advanced, or we shall be obliged to ask Messrs. Chaplin & Co. to see you and arrange the present account, and also payment of goods we may send in future. At present you really do not treat us fairly, but trespass too much on our good feeling towards you; for, we feel assured you must be paying others instead of ourselves.

“J. ALLNUTT & Co.”

On the 25th of March, 1854, in answer to a letter of the bankrupt requesting a further supply of goods, the defendant wrote him the following letter:—

“London, March 25th, 1854.

“Sir,—We are in receipt of your favour; but, till the account owing is liquidated, it is really asking us too much to lend you more money to pay duties. You must allow we have shown every disposition to assist you in all ways: but you must really show your exertions also; and then you will find us perfectly ready to advance duties, even for a month or so.

“J. ALLNUTT & Co.”

On the 5th of April, 1854, the defendant’s agent, Docker, called on the bankrupt, and mentioned the amount of the debt then due to the defendant, and said the defendant wanted security for his debt. He asked the bankrupt if he could pay any money; but the latter said “No.” Docker then said the bankrupt must go with him to the office of Messrs. Chaplin & Co. (who were the defendants’ attorneys); and Docker asked the bankrupt if he would give a judge’s order as security. *508] The bankrupt said, “No: if a judge’s order was required, he should be unable to go on and get credit;” and the bankrupt

accordingly went there. When they arrived at the office, Docker said, "Here's Beck can't go on again, and I want security for Allnutt's money." He also said that Beck had gone too far, and could not go on again, and that the defendant was afraid for his money, and must have it paid quickly.

Docker was agent for Hodges, a distiller, and for Whitbreads, the brewers, who were also creditors of Beck; and, a few days before the 5th of April, Docker had renewed a bill of Beck's for 169*l.*, due to Messrs. Whitbreads; and he said at Messrs. Chaplin & Co.'s office, that, as Whitbreads' bill was renewed, Beck must give the defendant something. At this time, Hodges was suing Beck for another debt: and Docker asked Beck how he was paying Hodges; to which Beck answered, that he was sending him remittances as he could. Docker again pressed Beck to pay him something down for the defendant; but Beck said he could not. Then it was agreed that Beck should give security to the defendant on the terms contained in the deed hereafter mentioned, which was prepared by Mr. Stibbin (of the firm of Chaplin & Co.) in consequence of instructions received from the parties at that interview.

The instructions having been given, the parties left the office; and an appointment was made that Beck should call again at three o'clock, P. M., to execute the security; and he called and executed it accordingly.

The following is an abstract of the mortgage-deed or security; and it was agreed that the original deed might be referred to and read, if necessary, as a part of the case:—

5th of April, 1854. Indenture between Isaac Beck, therein described, of the one part, and John Allnutt (the defendant) of the other part. After reciting that *the said Isaac Beck stood indebted to the defendant in 57*l.* 15*s.* 11*d.* as a balance of account, and, being [*509 pressed for payment thereof, but, unable conveniently to make the same, he had agreed, as an inducement for the forbearance thereof, to execute that security,—it was witnessed, that, in consideration of the premises, the said Isaac Beck did thereby demise, &c., to the defendant, his executors, &c., the messuage, public-house, or tenement known by the sign of The White Hart, being No. 19 Paradise Street, then in the occupation of the said Isaac Beck, with the appurtenances, to hold the same to the defendant, his executors, &c., for the residue of a term of fourteen years therein, commencing from the 24th of June, 1843, except the last three days, subject to the proviso thereafter contained: and it was further witnessed, that, in further pursuance of the said agreement, the said Isaac Beck did bargain, sell, assign, &c., unto the defendant, his executors, &c., All the trade and other fixtures, household furniture, implements, and utensils of household, and other effects and things of the said Isaac Beck, which then were in or upon the said messuage and premises, other than his stock in trade, as the same were then particu-

larized in the schedule thereunder written, To hold the same to the defendant, his executors, &c., for his and their absolute use and benefit, subject to the condition thereafter expressed. Covenant by Beck to pay to the defendant, his executors, administrators, or assigns, the sum of 570*l.* 15*s.* 11*d.*, with interest after the rate of five per cent. per annum, by instalments, as follows, viz. 50*l.* on the 10th of April instant, 50*l.* on the 24th of April instant, 30*l.* on the 1st of May then next, the like sum of 30*l.* on each of the fourteen Mondays next ensuing that day, and the remaining sum of 20*l.* 15*s.* 11*d.* on the fifteenth Monday thereafter *510] following, with interest, to be calculated as therein *mentioned. Proviso, that, on due payment of the instalments thereby secured, the deed should cease and become void; but that, upon default in any of such payments, it should be lawful for the defendant, his executors, &c., after giving the notice therein specified, (a) to enter on the premises and sell and dispose of the property comprised in the security as therein mentioned, and apply the proceeds of any sale in payment and discharge, first, of all expenses incident to the trusts of the deed, and then to satisfy the said sum of 570*l.* 15*s.* 11*d.* and interest thereby secured, or so much thereof as should be then unpaid, and pay over the surplus, if any, to Beck, his executors, &c.

A schedule followed the deed, enumerating the various shop fixtures, furniture, goods, and articles comprised in the security.

Beck had executed a security of a similar nature the year before, for the balance of account then due by him to the defendant, of 713*l.* 5*s.* 7*d.*, having been pressed by the defendant for such security.

The balance that was due at the time of executing the mortgage security of 1853, had all been paid off by instalments, except the sum of about 36*l.*, which was carried to account, and made part of the balance of 570*l.* 15*s.* 11*d.*, for which the deed now in question was given.

The deed of 1853 comprised the same property that was comprised in the deed of 1854.

At the time when the deed of the 5th of April, 1854, was executed, Beck owed about 3950*l.*, and the value of his assets was about 1183*l.* 9*s.* 6*d.*, as shown by the statement of accounts marked B., which was given in evidence at the trial, and was to be referred to as part of the case.

*511] The lease and fixtures of the house in Paradise Street *comprised in the mortgage security were worth, and produced on sale after the bankruptcy, 206*l.* 8*s.*; and the furniture and other articles also comprised in the security, were estimated in the above statement at 129*l.* 18*s.*, but produced on the sale 190*l.*, without deducting expenses.

The stock in trade at that time in the house in Paradise Street was worth 800*l.* Besides the house in Paradise Street, Beck, at the time of executing the mortgage, and from thence till his bankruptcy, had an-

(a) Three days' notice.

other house licensed for the sale of beer and tobacco, where he carried on business, in Smallbrook Street, Birmingham, and which, in an interview with the defendant's attorneys after the bankruptcy, when he applied to them to let his bankruptcy be superseded, he stated ought on his calculation to produce about 5*l.* a week profit. And the stock and fixtures at this house were worth about 36*l.* 1*s.* 9*d.*

Beck estimated his property at a much higher value than it afterwards realized. The auctioneer who sold it considered that it fetched a fair price. The accountant who proved the value of the assets at the trial, estimated them from the realized value under the bankruptcy.

The residue of the sum of 1183*l.* consisted of good debts amounting to 201*l.* 16*s.* 9*d.*, and a sum claimed to be due to Beck from one Martin, for damages for breach of an agreement to grant a lease, which claim was in litigation at the date of the bill of sale, but after the bankruptcy realized a net value of 144*l.* 5*s.* (after deducting costs of suing for the same), and cash in hand amounting to 165*l.* The 144*l.* 5*s.* was payable under a judge's order, which was produced at the trial, and was to be referred to, if necessary, as part of the case.

The 165*l.* cash in hand was received in the shop, which the bankrupt was saving to meet a bill coming due; and 60*l.* of it had been borrowed of one Levi, at 10 per cent. for three months.

*Beck had been pressed by many of his creditors before the time of giving the security; and he had been served with more than ten writs, which were produced on the trial; but most of these had been settled and paid for before he became a bankrupt. He had spent, as he stated, 700*l.* or 800*l.* in law. [*512]

After executing the mortgage security to the defendant, the defendant made further advances to Beck and on his account, and supplied him with further goods, in order to enable him to carry on his trade; and, between April and the 9th of June, the amount of such advances and goods supplied was upwards of 300*l.*: but the bankrupt from time to time paid sums on account amounting altogether to nearly the same amount. Beck, however, continued to be pressed by his creditors; and, in order to relieve his difficulties, he raised further moneys on the same terms with respect to interest as before; and he resold to various parties, for cash, goods which he had obtained from other parties on credit; and in this manner he sold goods to a Mr. Wood, at Manchester, to the amount of 400*l.*, and to Mr. Lewis, at Bristol, to the amount of between 600*l.* and 700*l.*, and allowing 12½ per cent. discount for cash. He had very few transactions of this kind previously to the execution of the deed of the 5th of April, 1854.

On the 19th of June Allnutt wrote to Beck, as follows:—

“London, 19th June, 1854.

“Dear Sir,—We are in receipt of your favour, enclosing notes 20*l.*, and bill 35*l.* 11*s.* 8*d.* When we extended the credit for the debt due

to us, the agreement was, that you were to pay cash for any goods that you might require; and you will observe that we have already got acceptances, instead of cash, for 249*l.* 15*s.* 4*d.*, as per statement at foot.
 *513] We must, therefore, request a cash *remittance for about the amount (76*l.*) before sending the pipe of port.

“Bills running.

“ 89*l.* 16*s.* 0*d.*, due 20th of June.

“ 100*l.* 0*s.* 0*d.*, due 30th of July.

“ 85*l.* 11*s.* 8*d.*, due 12th of July.

“ 74*l.* 7*s.* 8*d.*, due 28th of August.

“£249 15*s.* 4*d.*”

On the 22d of July, 1854, Beck became a bankrupt; and the plaintiffs are the trade and official assignees.

The bankrupt had continued in possession of the houses and property comprised in the mortgage security up to the time of his bankruptcy: but, after that event, the defendant claimed the interest in the house and the fixtures under the mortgage security, but abandoned any claim to the furniture and other effects comprised in the deed, on the ground that the bankrupt had been permitted to retain the order and disposition of them as reputed owner. The assignees consequently sold and received the proceeds of the latter goods; but the defendant sold and received the proceeds of the leasehold house and fixtures, amounting to 206*l.* 8*s.*, and for which sum the present action is brought by the assignees, on the ground of the invalidity of the mortgage security of the 5th of April, 1854.

The court was to be at liberty to draw all inferences of fact which a jury might have drawn from the circumstances above stated.

The question for the opinion of the court was, whether, under the circumstances stated, the deed of the 5th of April, 1854, was an act of bankruptcy, and invalid. If the court should be of opinion that the said deed was invalid, then judgment was to be entered for the plaintiffs for the sum of 206*l.* 8*s.*: but if the court *should be of the
 *514] contrary opinion, then judgment was to be entered for the defendant.

The case was argued in Easter Term last, before Jervis, C. J., Cresswell, J., Crowder, J., and Willes, J.

Hugh Hill (with whom was *Bittleston*), for the plaintiffs.(a)—The

(a) The points marked for argument on the part of the plaintiffs, were,—

“That the execution by Isaac Beck of the deed of the 5th of April, 1854, under the circumstances therein mentioned, was an act of bankruptcy within the 67th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106; and that the said deed is contrary to the policy of the said act, and void as against the plaintiffs, inasmuch as Beck was, at the time of the execution of the said deed, completely insolvent, and the necessary or natural consequence of putting the deed in force would have been to prevent Beck from carrying on his business in the ordinary way, and to defeat or delay his creditors.”

conveyance in question was clearly fraudulent and an act of bankruptcy. It appears from the statement of the case that Beck, who carried on the business of a licensed victualler, and who was in debt to the extent of about 4000*l.*, his whole assets being worth something less than 1200*l.*, and who was being pressed by various creditors, and in that state to which the term "hopelessly insolvent" might be well applied,—all which facts were at the time well known to the defendant's agent,—conveys away to the defendant the premises wherein he was licensed to carry on his business; thereby parting with everything necessary to the carrying on of the business in the only place where he could carry it on. The deed, it is true, does not convey *all* the plaintiff's property; but he was thereby substantially dispossessing himself of all means of carrying on his trade: if default were made in payment of the first instalment, the defendant was at liberty, on giving three days' notice, to enforce the deed by sale. If a trader *parts with *all*, or all but a mere colourable portion of his property, he clearly commits an act of bankruptcy: so, if he parts [*515 with a portion of his property without receiving an equivalent, and such parting with a portion of his property has the effect of stopping his business, it equally amounts to an act of bankruptcy. In *Young v. Waud*, 8 Exch. 221,† the party was not insolvent at the time of the assignment: and Lord Chief Baron Pollock lays down the rule in these terms:—"The verdict seems to have passed upon the ground that the effect of the deed would, if put in force, be, to stop the business of the factory. I am of opinion that such an effect does not of itself make the deed an act of bankruptcy; and, upon considering the evidence in the case, there is nothing to make it an act of bankruptcy. I am satisfied that the direction, that the transfer was an act of bankruptcy for the reason assigned, is not correct in law. If a man's business be that of a carrier, and he sell his horse and cart, but has ample funds to buy another horse and cart, such an assignment is no act of bankruptcy: and so in the case of an assignment of a man's whole stock, where he has the means of carrying on other business, the assignment is not an act of bankruptcy, although the instrument, by being put in force, stops the business: but the assignment must be such as puts a stop to the business by reason of the party's insolvency." And Parke, B., adopts the same rule. "Acts of bankruptcy," he says, "arising from fraudulent assignments are confined to acts of a fraudulent nature under the statute of Elizabeth,(a) with an immediate object to defeat creditors; to such as are fraudulent under the bankrupt acts, being made with the object of preventing an equal distribution of the bankrupt's effects under his bankruptcy, which he knows must occur; and, lastly, to those where there is a transfer of property, which must *necessarily in its results be known to the bankrupt to lead to the delay and disap- [*516

pointment of all the creditors, with the exception of that particular individual to whom the transfer is made. Such a transfer is also an act of bankruptcy, upon the principle that every man is bound to contemplate the necessary result of his own acts." The rule was similarly laid down in *Wedge v. Newlyn*, 4 B. & Ad. 831 (E. C. L. R. vol. 24). [CRESSWELL, J.—How was Beck more insolvent after the execution of this deed than he was before?] He thereby enabled the favoured creditor to sweep away a large portion of that property which ought to have been rateably distributed amongst the creditors. The case of *Ex parte Bailey*, *In re Barrell*, 22 Law Journ. Bankruptcy, 45, is extremely difficult to be distinguished from the present. There, a trader assigned to particular creditors, by a deed dated the 20th of December, *at their instance, and on their threatening proceedings*, all his debts, bills of exchange, promissory notes, and other securities, and all books of account, as a security for their debt. At this time, although the fact was not known to the trader, writs on two judgments, which some time before had been obtained against him, were lodged in the hands of the sheriff. Two days after the deed, the sheriff seized the trader's stock in trade and furniture. The next day the petition for adjudication was presented, and the day following the trader was adjudged bankrupt. The particular creditors claimed the property comprised in the deed, but the commissioner disallowed the claim, and declared the deed void as against the general creditors. On appeal, the decision of the commissioner was affirmed; the court holding that the deed being a transfer of so much of his estate and effects as rendered it impossible for him to carry on his trade in the ordinary and usual course, although executed under pressure, and although it was the unwilling act of the trader, was void as against the *general body of the creditors. Lord Justice

*517] Turner, in giving judgment, said: "I apprehend that the true principle is, whether there was such an assignment as to prevent the bankrupt's trade being carried on. I agree with the commissioner, that 'carrying on his trade' means carrying it on in the ordinary and usual course. This doctrine was laid down by Lord Mansfield in the case of *Hooper v. Smith*, 1 Sir W. Bl. 442, where he says, 'Indeed, if a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent. It would be an assignment of his solvency.' This doctrine might possibly now be considered as going a little too far, but it nevertheless shows the principle upon which the cases proceed; for, the reason why an assignment of the entire estate constitutes an act of bankruptcy, is, because the bankrupt is prevented thereby from carrying on his trade; and that equally applies where the trader assigns so much of his property as prevents him from carrying on his trade in the ordinary way." Upon the same principle proceeded the case of *Carr v. Burdiss*, 1 C. M. & R. 443,† where Parke, B., says,—“In order to render an assignment of a trader's effects an

act of bankruptcy, it must be shown that the party assigned all, or so nearly all of his effects as to put it out of his power to carry on the trade." [CRESSWELL, J.—Parke, B., in *Smith v. Cannan*, 2 Ellis & B. 85, 45 (E. C. L. R. vol. 75), says that that is not the true criterion. He says: "The test is, not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader." JERVIS, C. J.—Can we say that this assignment per se is an act of bankruptcy?] The court is sitting here as a jury. [CROWDER, J.—If instead of giving a mortgage, Beck had paid the money, would that have been an act of bankruptcy?] Payment of a debt under pressure is no act of bankruptcy. [CRESSWELL, J.—If a man, having many *creditors, assigns to one of them property [518 exceeding in value the amount of the debt, to the extent of the excess he thereby defeats and delays the others. Payment under pressure, and without intention to prefer, is no act of bankruptcy. So, an assignment, under similar circumstances, for just value, would be no act of bankruptcy. If an absolute assignment would not be an act of bankruptcy, why should a conditional assignment be so? JERVIS, C. J.—A trader may honestly sell the whole of his property: suppose one creditor, hearing of it, were to come and demand his debt, and obtain the whole of it, would that be an act of bankruptcy?] Unquestionably it would, if it put it out of the trader's power to carry on his trade, and had the effect of defeating or delaying creditors.

Mellor (with whom was *Brewer*), contra.(a)—An assignment by a trader of the whole of his property, or the whole with a colourable exception, whereby he puts it out of his power to continue his trade, is an act of bankruptcy, upon the ground stated by Jervis, C. J., in *Smith v. Cannan*, viz., that its necessary consequence is to delay his creditors, and a man must be taken to intend the necessary consequences of his acts. But, in no case has it been held that a transfer of a part of the trader's property is an act of bankruptcy, unless by way of fraudulent preference. Here, there is no pretence for saying *that there [519 was any intention on Beck's part to prefer the defendant: he made the assignment for the bonâ fide purpose of relieving himself from pressure, and with a view to obtain further advances to enable him to continue his trade. In *Wedge v. Newlyn*, 4 B. & Ad. 881 (E. C. L. R. vol. 24), Taunton, J., in leaving the case to the jury, stated the law to be, "that, if a man dispose of his stock in trade or goods and chattels to such an extent as to disable himself from carrying on his business as a trader, and make himself insolvent, such conveyance is fraudulent; it

(a) The points marked for argument on the part of the defendant, were,—

"That the execution of the deed in question was not an act of bankruptcy, the same deed not being an assignment of *all* Beck's effects, nor of all with the exception of a small or colourable part, and having been obtained by pressure and importunity of the defendant, and being an assignment by way of mortgage precisely similar to a previous one which the bankrupt had paid off, and the bankrupt being allowed by means of the deed further credit and advances from the defendant."

need not be a transfer of all his goods and chattels; nor is it necessary to show that he had bankruptcy in contemplation, if he knew, that, in making the conveyance, he became insolvent and unable to go on with his business: the result in that case must be that the creditors in general are delayed, and suffer injury in proportion as the particular creditor is benefited." The element of insolvency existed in *Carr v. Burdiss*. In *Lee v. Hart*, 10 Exch. 555, 559,† Parke, B., says: "The statute (a) means a fraudulent gift or delivery or transfer of goods, with intent immediately by that act to defeat or delay creditors, as a gift or delivery of goods on the eve of bankruptcy frequently is: but there may be a transfer of goods by sale, with a fraudulent intent on the part of the trader, which is nevertheless a valid transfer. If a trader sells goods at a less price than they are worth, and makes a practice of it, though it is obvious that such a practice must *ultimately* end in bankruptcy, none of such sales, simply as such, constitutes an act of bankruptcy; and, even where the trader intended, on a particular sale, to run away with the price, and cheat his creditors, such sale is not an act of bankruptcy. But, if the purchaser is a party to that intention, then it would be a fraudulent transfer within the statute. This appears to have been the *520] meaning of Lord Tenterden in *Cook v. Caldecott*, *M. & N. 522, as explained by the Court of King's Bench in *Baxter v. Pritchard*, 1 Ad. & E. 456 (E. C. L. R. vol. 28), 3 N. & M. 638." The learned baron there assumes insolvency. *Ex parte Bailey* is a case of the same sort. In *Worsley v. De Mattos*, 1 Burr. 467, 478, Lord Mansfield says,—"There is a great difference between the conveyance of *all* and of a *part*. A conveyance of a part may be public, fair, and honest: as a trader may sell, so he may openly transfer many kinds of property by way of security; but a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." And, at the end of the judgment, p. 484, he says,—"Under all the circumstances, we are of opinion that this conveyance of the bankrupt's *whole* substance to De Mattos, though by way of security, and for valuable consideration, is fraudulent and an act of bankruptcy. The determination here is, upon the assignment of *all*." The first hint of the doctrine of colourable exception is to be found in *Wilson v. Day*, 2 Burr. 827, though there the assignment was of all the party possessed,—Lord Mansfield saying, that "*colourable exception* of a *small part* of his estate or effects would not help the matter; for, the court would never suffer that *an evasion* should prevail to take such a case out of the general rule, which is so essentially necessary to be observed in order to a due execution of this system of laws." *Hooper v. Smith*, 1 Sir W. Bl. 441, is a strong authority in the defendant's favour. Lord Mansfield there says: "The rule of law is clear and established. If a man, not having previously committed any act of bankruptcy, in order to pay

even a just debt, assigns *all* his effects to the creditor,—or all but some colourable part (which was the case of *Crompton v. Bedford*, H. Vac. 2 G. 3),—or all to several creditors, but in total exclusion of any one or more of them,—this in itself would make him a bankrupt; it would be the very act of bankruptcy. But a *preference to one creditor, especially by assigning only part of his goods, and to pay only part of the debt, has been frequently [*521 held to be good; (a) particularly in *Cock v. Goodfellow*, 10 Mod. 489 (the case of a parent and child), *Small v. Owdly*, 2 P. Wms. 427, and others. Indeed, if a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent. It would be, as I said in *Compton v. Bedford*, an assignment of his solvency. An assignment of all his household goods would be the same; for, a man can't go on without them. But, is half such a part of a man's stock as must necessarily have this effect? This would be going beyond any case that has yet been determined. Suppose he had sold the goods in question to John or Thomas, and with that ready money had paid his mother part of her debt,—would that sale or payment have been void?" *Balme v. Hutton*, 2 Y. & J. 101,† is also strongly in the defendant's favour. There A. and B., being in embarrassed circumstances, conveyed to C. all the machinery in their mills, and all the machinery to be substituted in lieu thereof, to secure a debt of 3029l. 9s. 7d., with interest, defeasible, however, upon the payment of that sum, with interest, by instalments of 50l. in each succeeding month; but had other property: and it was held that this was not per se an act of bankruptcy, but that it should have been left to the jury to say whether the conveyance was a fraudulent preference. At the close of the argument, Hullock, B., said: "To bring this within the first class of cases, it should have been shown that the conveyance comprehended all the property, or at least that there was but a colourable exception. If there were other property, then it was a question for the jury whether the conveyance was a fraudulent preference. I know of no case where a conveyance of part of a man's property *is per se an act of bankruptcy." And afterwards, in giving judgment, Alexander, C. B., said: "This is an assignment of certain machinery only, and does not upon the face of it import that it is an assignment of all the property of the bankrupts, with a colourable exception only; and upon that ground we are of opinion that it does not upon the face of it amount to an act of bankruptcy." [CRESWELL, J.—That seems to exclude the question of intent to defeat or delay creditors, where the assignment is of a portion only.] It does so. In *Chase v. Goble*, 2 M. & G. 930 (E. C. L. R. vol. 40), 3 Scott, N. R. 245, it was held that a conveyance by a trader of his effects at a certain place, is not an act of bankruptcy, unless it be shown that he had no other effects. Here, the

(a) But see notes (r) and (t) to Elsiey's edition, p. 442.

assignment was of about one-third of the assets of Beck; and it appeared that he had a public-house in another place. The debt which was the consideration for the assignment was payable on demand; by this arrangement, Beck obtained not only considerable delay, but also further advances. Upon the same principle proceeded the case of *Lindon v. Sharp*, 6 M. & G. 895 (E. C. L. R. vol. 46), 7 Scott, N. R. 730. So, in *Siebert v. Spooner*, 1 M. & W. 714,† Lord Abinger says: “If a man assigns the whole of his effects, not for a new consideration, but for an outstanding debt, that is an act of bankruptcy; *because the very nature of the transaction prevents him from carrying on his trade.*” The true principle is well enunciated in the judgment delivered by Jervis, C. J., in *Graham v. Chapman*, 12 C. B. 85, 108 (E. C. L. R. vol. 74),—“The sale of *the whole* of a trader’s stock to a bona fide purchaser, for a fair price, has been held not to come within the rule, even though creditors may ultimately be delayed or defeated, and the misapplication of the proceeds was contemplated by the trader at the time of sale,—because the trader gets a present equivalent for his goods, and the sale is strictly in the course of his business: and, of course, *523] the sale of *part* of a *trader’s stock, for the fair price of that part, cannot be objected to. But the sale of the whole for the price of a part, not because the trader is obliged, under pressure, to sell his stock for less than its value, but because an old debt is taken as part of the price, though it may not be the moving cause of the transfer, admits of a different consideration, and might be held to be an act of bankruptcy, without conflicting with former decisions. It comes within all the mischiefs referred to by the counsel for the plaintiffs, as deduced from the older cases. The trader gets no present equivalent for his stock; and the transfer, having the effect of defeating and delaying his creditors, would be a fraudulent transfer with the intent to effect that object.” *Newton v. Chantler*, 7 East, 138, also supports the distinction here contended for: Lord Ellenborough there says,—“As a general proposition, it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor, in prejudice of the rest, is an act of bankruptcy. Every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. Here, the necessary effect of the act done, was, to turn round all his other creditors, and prevent them from pursuing their present ordinary remedy against him for the payment of their demands, leaving them only to look to him for the future surplus, if any. Being insolvent within his own knowledge at the time, and two writs out against him, he must have contemplated bankruptcy by means of arrest and lying in gaol two months; and, under these circumstances, he gives the bill of sale to one of his creditors, conveying *all* his property. Must he not, then, have contemplated the necessary consequence of his own act? And, as such an act must have the effect of defeating or delaying all

his other creditors, by stripping him of all he had, and disabling him from carrying on his trade, must I not deduce the inference *from it that he meant to defraud all his other creditors? *This is not like a partial conveyance only of a trader's property, which is open to a different consideration.*" [*524]

Bittleston, in reply.—It is impossible to reconcile all the decisions and dicta upon this subject. The safest way, therefore,—and so *Jervis, C. J.*, seems to have thought in *Smith v. Cannan*,—is, to look to the words of the act. Now, the 67th section of the 12 & 13 Vict. c. 106, enacts, that, if any trader liable to become bankrupt, shall make or cause to be made "any fraudulent grant or conveyance of *any* of his lands, tenements, goods, or chattels," "with intent to defeat or delay his creditors," he shall be deemed to have thereby committed an act of bankruptcy. In *Porter v. Walker*, 1 M. & G. 686 (E. C. L. R. vol. 39), 1 Scott, N. R. 568, it is said to have been ruled by *Littledale, J.*, at *Nisi Prius*, and not to have been questioned,—that an assignment by an innkeeper of all the furniture and other effects at the inn (except his stock in trade, money, and book-debts), to a creditor, in trust to sell, and pay himself, returning the surplus to the innkeeper, inasmuch as it disabled the latter from carrying on his business, amounted to an act of bankruptcy, if the party were insolvent at the time of the assignment. [*JERVIS, C. J.*—*Lord Wensleydale* says (in *Smith v. Cannan*), that, whether or not the necessary effect of the deed is to stop the trade, is not the question. He probably means that it is not the naked question. If the necessary effect of the deed is to stop the trade, so as to defeat or delay the creditors of the trader, it is an act of bankruptcy.] Exactly so. It is impossible to look at the deed in the present case, in conjunction with the other circumstances, without seeing that its necessary effect must be to stop *Beck's* trade, and so to tend to defeat and delay his other creditors. [*JERVIS, C. J.*—Is not the real test, whether the necessary effect of the *deed is to defeat or delay the creditors? It is *always* a question for the jury: still they must find the necessary consequence of the man's act. If the effect of the deed, from the state in which the trader is, must necessarily be to wind him up, undoubtedly it would be an act of bankruptcy. But here that was not the necessary effect of the deed. If he paid the instalments, he would get more time.] [*525]

JERVIS, C. J.—As this is a case of considerable importance, it will be desirable to take time for deliberation, in order that the view we take may be put in precise language. *Cur. adv. vult.*

JERVIS, C. J., now delivered the judgment of the Court.

We are of opinion, that, under the circumstances stated in the case, the deed of the 5th of April, 1854, does not appear to have been an act of bankruptcy, and that consequently the defendant is entitled to our judgment.

The deed was made between *Isaac Beck*, the bankrupt, of the

one part, and the defendant of the other part. It recited, according to the fact, that the bankrupt was indebted to the defendant in 570*l.* 15*s.* 11*d.*, upon balance of account for goods sold and delivered; and that, being pressed for payment, he had agreed, as an inducement for forbearance, to execute that security. It then proceeded to mortgage to the defendant, by way of demise, the public-house in which the bankrupt carried on business, and to assign his trade and other fixtures and movable property in the house, other than his stock in trade; with a proviso for payment by the bankrupt to the defendant *526] of the sum due, with interest *at 5 per cent., by instalments, the period for payment of which extended over several months.

The value of the property mortgaged was between 300*l.* and 400*l.* The value of the bankrupt's assets at the time was between 1100*l.* and 1200*l.* His debts amounted to nearly 4000*l.*

The bankrupt continued his business, received further supplies of goods and advances of money from the defendant, and made various payments to creditors after the execution of the deed. He became bankrupt on the 22d of July in the same year.

It appears, therefore, that this does not fall within that class of cases in which an assignment has been made of the whole, or the whole with a colourable exception, of the trader's property, the necessary result of which is, to defeat and delay creditors by producing absolute present insolvency and incapacity to carry on trade, and withdrawing the whole of the property from the reach of the creditors by the ordinary legal remedies. Nor is the deed void by reason of being a fraudulent preference of the creditor to whom the security was given, because, assuming it to have been made in contemplation of bankruptcy, it was not voluntary on the part of the bankrupt, but was procured by means of pressure on the part of the creditor.

The fact so much relied on for the plaintiff, that the bankrupt, at the time of executing the deed, was indebted to the amount of nearly 4000*l.*, and that other creditors were pressing him for payment, is important in determining whether the assignment was made in consequence of the importunity of the defendant, or whether it was uninfluenced thereby, and made with a view to give him a fraudulent preference; in which case, according to the rule in *Cook v. Pritchard*, 5 M. & G. 329 (E. C. L. R. vol. *527] 44), 6 Scott, N. R. 34, the deed would be void, *notwithstanding the pressure. It appears, however, that most of those other pressing creditors had been settled with and paid before the bankruptcy; and there is not, therefore, sufficient ground for coming to the conclusion that the pressure by the defendant exercised no influence upon the mind of the bankrupt; and, if it did exercise any, there was no fraudulent preference,—*Brown v. Kempton*, 19 Law Journ. C. P. 169.

Neither does the case fall within the class of assignments void by the statute of Elizabeth, and therefore acts of bankruptcy, as being made

without valuable consideration, or for a consideration fraudulently inadequate; because it was given to secure a debt of greater amount than the value of the property assigned. And there is no other circumstance in the case to show that the deed was executed in bad faith, for the purpose of defeating or delaying creditors.

We therefore give judgment for the defendant.

Judgment for the defendant.(a)

(a) See *Leake v. Young*, 5 E. & B. 955 (E. C. L. R. vol. 85).

STAMMERS *v.* HUGHES and STANLEY. *June 12.*

The court will entertain an application for the discharge from custody of a party arrested on a *capias* under the 1 & 2 Vict. c. 110, s. 3, or for the restoration of money deposited on the arrest, where it *plainly* appears that the plaintiff has *no cause of action*.

THE defendant, Emma Stanley, was arrested at Liverpool on the 10th of May last, upon a writ of *capias* issued against her by virtue of a judge's order obtained upon an affidavit of the plaintiff, stating, that the above-named defendants were before and at the time of the commencement of this suit, and still were, justly and truly indebted to the plaintiff in the sum of 63*l.* for *work and labour done by him for the defendants and at their request, and for money paid, &c., for their use; [*528 that the above-named Emma Stanley, who was an actress and vocalist, had accepted and entered into an engagement for a considerable period for New York, with the proprietor of a theatre there; that deponent was informed by the person through whom such engagement was made (and which information he believed to be true), that the said Emma Stanley would sail from Liverpool on or about the 10th of May; and that he verily believed he would lose the said 63*l.* so due and owing to him as aforesaid, unless the said Emma Stanley were forthwith apprehended and held to bail.

Being so arrested, Miss Stanley deposited with the sheriff of Lancashire 63*l.*, the amount of the alleged debt, and 10*l.* for costs, and on a former day in this term,

Gifford obtained a rule calling upon the plaintiff to show cause why the money so deposited with the sheriff should not be restored to Miss Stanley, on the ground that the proceeding was an abuse of the process of the court. The motion was founded upon affidavits denying that the defendants or either of them were or was indebted to the plaintiff in any money whatever; and alleging that the plaintiff's pretended claim was founded upon an agreement (since put an end to) of which the following is a copy:—

“Agreement made this — day of November, 1855, between Joseph Stammers and Thomas William Hughes of the one part, and Emma Stanley of the other part. In consideration of the services to be rendered.

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dered and performed by the said Emma Stanley as hereinafter mentioned, they the said J. Stammers and T. W. Hughes hereby agree to engage the said Emma Stanley for the term of one year, commencing from the *529] 10th of *December next, to play, sing, and perform in a musical monologue, or similar entertainment, such performances to take place for two months at least in the metropolis of London, and afterwards for the remainder of the said term of twelve months at such place or places as they the said J. Stammers and T. W. Hughes shall appoint. And the said J. Stammers and T. W. Hughes, in consideration of such services as aforesaid, further agree to pay to the said Emma Stanley a sum equal to one-third part of the gross receipts taken or payable on account of the said performances as aforesaid, free and clear of all deductions whatsoever, and further covenant and agree that twenty-four of such performances as aforesaid shall take place per month during the time that the same shall be holden in London, and twelve of such performances at least per month when the same shall take place elsewhere; and in default of such respective numbers of twenty-four and twelve performances taking place per month as aforesaid, then they the said J. Stammers and T. W. Hughes agree to pay the said Emma Stanley at the rate of 3*l.* 10*s.* for each and every such default. And the said J. Stammers and T. W. Hughes agree to hire and provide suitable rooms and places for such performances, and to pay the rent and all other necessary expenses for the same, including gas and musicians, servants' and assistants' wages (except the dresser of the said Emma Stanley); and also to provide all stage fittings, furniture, and decorations, and also fitting and proper musicians and other assistants for such performances as aforesaid: and, further, that they will advertise and announce such entertainments in newspapers and by bills, and will use all other reasonable and proper means of obtaining publicity and success for the said entertainment: and, further, that, during the said term of one year, they the said J. Stammers and T. W. Hughes will not, nor will either *530] of them, introduce or cause or procure to be *introduced or played the same or any similar entertainment: and, further, the said J. Stammers and T. W. Hughes hereby agree to pay or cause to be paid to the said Emma Stanley the said sum equal to the one-third part of the said gross receipts so to be paid to her as aforesaid before 12 o'clock of the day following the day on which such performance shall take place or such gross receipts be received, or, if twenty-four and twelve such performances respectively shall not take place each month as aforesaid, then, at the expiration of each month, a sum at the rate of 3*l.* 10*s.* for each and every performance less than the said number of twenty-four and twelve respectively: And, for the consideration aforesaid, the said J. Stammers and T. W. Hughes performing the covenants and agreements hereinbefore contained on their parts, the said Emma Stanley hereby agrees to perform the said entertainments for the term of one

year, commencing from the 10th day of December next, exclusively for the said J. Stammers and T. W. Hughes, in manner and at the time aforesaid; and, further, to use her best endeavours to make the said entertainment successful and popular, and, after the expiration of two months from the 10th day of December next, at such place or places as the said J. Stammers and T. W. Hughes may appoint; and, further, that the said Emma Stanley shall and will pay all her own and her dresser's travelling and personal expenses,—provided always, that, if the said Emma Stanley should be required to travel out of the United Kingdom of Great Britain and Ireland, then the travelling expenses of the said Emma Stanley shall be defrayed by the said J. Stammers and T. W. Hughes: And the said Emma Stanley further agrees that she will provide herself with all dresses and properties necessary for the said entertainment: Provided always, that if the said J. Stammers and T. W. Hughes shall neglect or refuse to pay the said moneys so to be *paid to the said Emma Stanley as aforesaid, at the time aforesaid, or shall make default in any of the covenants or agreements [*581 herein contained, then she the said Emma Stanley, on giving one week's notice of such her intention to the said J. Stammers and T. W. Hughes, may determine this agreement, and the same shall be wholly void and of no effect, anything herein contained to the contrary notwithstanding: And it is hereby further agreed between all the said parties hereto, that the said T. W. Hughes, or his appointee, shall in the first place take all moneys received on account of the said entertainment, and thereout from time to time pay the said Emma Stanley the said sum or sums of money equal to one clear third of the said gross receipts as aforesaid: Provided lastly, that the said J. Stammers and T. W. Hughes shall have the exclusive right to receive for their own use and benefit all profits that may be derived from the sale of the programmes and songs connected with the said entertainment."

(Signed by the three parties.)

At the foot of the agreement was the following memorandum, signed by Stammers and Miss Stanley,—“Messrs. Stammers and Hughes reserve to themselves the right of publishing and selling the programmes and words of such entertainment.”

Gifford admitted that there was an authority opposed to the application, viz., the case of *Copeland v. Child*, 22 Law Journ. Q. B. 279. [WILLES, J.—There is also an authority in your favour in the Exchequer,—*Pegler v. Hislop*, 1 Exch. 437,†—where Parke, B., says: “I think the words of the statute leave the whole matter at large. Under the statute 12 G. 1, c. 29, the plaintiff had a right to arrest the defendant on one condition only, that he made an affidavit of the cause of action; and that affidavit could not be contradicted. But the statute *1 & 2 Vict. c. 110, differs from that very materially; for, by the 3d section, the plaintiff is bound by affidavit to show to the satis- [*532

faction of a judge 'that he has a cause of action against the defendant to the amount of 20*l.* or upwards, and that there is probable cause for believing that he is about to quit England;' and the 6th section allows any defendant to appeal to a court against the order of a judge for holding him to bail. The whole matter is therefore left at large by the wording of the statute, *and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff's affidavits contain.* Acting upon this view at Chambers, I have relieved parties where the debt was barred by the statute of limitations. *It must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere.*"] *Graham v. Sandrinelli*, 16 M. & W. 191,[†] was also referred to.

Watson and Pearse showed cause, upon long affidavits detailing the history of the engagement and its alleged breach, but failing to make out that *Stammers* had any cause of action against the defendants jointly or against Miss Stanley separately.—The real question is, whether it is competent to the court upon a motion of this sort to enter into any inquiry save as to whether or not the defendant was about to quit the country. There is an express decision of Coleridge, J., in *Copeland v. Child*, that the court cannot try upon affidavit the existence of the alleged debt. That learned judge, evidently after much consideration, says: "Section 3 reserves the power of holding the defendant to bail where the plaintiff shall show to the satisfaction of a judge that he has a cause of action to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing *533] that the defendant is *about to quit England. One of these points goes to the foundation of the action, that is, directly to the merits. The other is a matter collateral, viz. whether the defendant is about to quit the country. Section 6 gives the defendant liberty to apply to a judge or the Court to be discharged out of custody. I quite agree that there is nothing in the words of the act to show that any distinction is to be made between the two questions; but *the judges have held, that, as before the act, people were never allowed to deny the truth of the affidavit to hold to bail, because that was matter which went to the merits, and was ultimately to be tried by the jury, so now, for the same reason, as to the existence of a debt or cause of action, the practice is to stand as before, and the affidavit therefore is conclusive*, subject, however, to its being impeached for matter apparent on the face of it. The only question which the judge enters into, is, whether the party is about to leave the kingdom. As that point cannot be discussed elsewhere, the parties are heard upon the merits. On that ground, the defendant is allowed to file affidavits, and the plaintiff may file further affidavits. The courts have never gone beyond that. If I were now to receive affidavits as to the cause of action, there might be this inconvenience: I might discharge the defendant on the case made by the affidavits, but

the jury might take an entirely different view of the matter; and the result would be, that the plea would not be made out, and yet in the mean time the defendant might have left the country. The practice has uniformly been the other way. It is founded upon a full consideration of what the law was before, and what would be the most convenient and equitable rule to pursue for the future." The only authority opposed to that is the case of *Pegler v. Hislop*, 1 Exch. 487,† where the matter was hardly discussed at all. [JERVIS, C. J.—I observe my Brother Coleridge says, it had been before decided in *the way [*534 he mentions. Does he mention where?] He does not; neither [*534 does he refer to *Pegler v. Hislop*. [JERVIS, C. J.—The agreement states that Miss Stanley is to be paid by a proportion of the gross proceeds. Is not that decisive?] The present claim is for preliminary expenses. [JERVIS, C. J.—It is all part of the same transaction.] It is a question for a jury.

Gifford, in support of his rule, was stopped by the court.

JERVIS, C. J.—I am of opinion that this rule should be made absolute. It appears that Stammers and Hughes negotiate for what they call a monological entertainment to be given by Miss Stanley; and an agreement is entered into between Stammers and Hughes of the one part and Miss Stanley of the other part, by which they engage her for one year, stipulating to pay her one-third of the gross receipts, and a certain sum per night in the event of their failing to get up a given number of performances in each month. The matter not proving a successful speculation, the agreement is somehow put an end to, and Mr. Stammers brings an action against Hughes and Miss Stanley, in which he has the boldness to swear that they are indebted to him in the sum of 68*l.* for work and labour done by him for them at their request, and for money paid by him for their use. I think it is a gross abuse of the process of the court, and that we have abundant authority to redress it.

CRESSWELL, J.—*Pegler v. Hislop* is a distinct authority to show that the court has power to enter into the inquiry. The very words of the 3d section of the 1 & 2 Vict. c. 110 show it. I do not see why the defendant should not be permitted upon a motion of this sort to controvert the existence of the debt: and I *am satisfied, upon the affidavits brought before us, that the plaintiff's claim is wholly [*535 unfounded.

WILLIAMS, J.—I am of the same opinion. I never for a moment doubted that the question was an open one. But, at the same time, I have always said that I would not take upon myself to try a question which was at all doubtful. I have no hesitation in the present case in saying that the plaintiff has not a shadow of claim.

WILLES, J.—I am of the same opinion. Even before the statute 1 & 2 Vict. c. 110, I apprehend the court had abundant power to interfere to prevent an abuse of its process. *Cocker v. Tempest*, 7 M.

& W. 502,† is a clear authority to show that every court has unlimited power over its own process. Alderson, B., there says: "The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior: were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion: and, where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably: but, if it be made out that the process of the court is used against good faith, the court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a court of equity in granting an injunction, is, that the injunction stops proceedings in another court, this only in the court in which the proceedings are." Rule absolute.

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*LOCKWOOD v. NASH. June 10.

To an action for work and labour, &c., the defendant pleaded that B. recovered a judgment against the plaintiff, and, being such judgment-creditor, applied for and obtained an order under the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, that the debt due from the now defendant to the plaintiff should be attached to answer the judgment so recovered against the plaintiff by B., that the debt was still unsatisfied, and that the order still remained in force:—Held, a bad plea, for not alleging that the order was served upon, or notice thereof given to, the garnishee.

Held also, that recourse could not be had to the replication for the purpose of curing the defect in the plea.

Quære, as to the effect of an order *duly served*, as to *binding* the debt in the hands of the garnishee?

Plea, demurrer and replication thereto, and demurrer to the replication: the plea being bad,—Held, that the plaintiff was entitled to judgment on the whole record, the first fault being in the plea.

THE plaintiff declared for money payable by the defendant to him for work done by him for the defendant at his request, and commission due and payable from the defendant to him in respect thereof, and for money paid, interest, and money due from the defendant to him on accounts stated between them,—claiming 1500*l*.

The defendant pleaded,—first, never indebted,—secondly, payment before action,—thirdly, a set-off for work done, wages and salary as a hired servant, money lent, money paid, money received, and money found due on accounts stated.

And for a fourth plea the defendant said, that, after the accruing of the plaintiff's claim in the declaration mentioned, and after the making, passing, and coming into operation of the Common Law Procedure Act, 1854, and before the commencement of this suit, to wit, on the 28th of February, 1855, John Brown and Arthur Ballantine recovered a judgment in Her Majesty's Court of Common Pleas, at Westminster,

for the sum of 1455*l.* 2*s.* 4*d.*, against the said plaintiff, and were judgment-creditors of the plaintiff within the meaning of the said statute to that amount; and, being such judgment-creditors, theretofore, and before the commencement of this suit, to wit, on the 23d of October, 1855, they the said judgment-creditors made an *ex parte* application *to Sir J. S. Willes, one of the judges of the said Court of Common Pleas, [537 upon affidavit, duly made, pursuant to the said statute, stating that such judgment had been recovered, and that it was still unsatisfied, and that the defendant was indebted to the now plaintiff, and was within the jurisdiction of the said court; whereupon, upon hearing the attorneys or agents for the said judgment-creditors, and upon reading the affidavit of P. M. S. and others, it was duly ordered by the said Sir J. S. Willes, so being such judge as aforesaid, pursuant to the said statute, that *all debts due and owing or accruing due from the said now defendant to the said now plaintiff should be attached to answer the said judgment so recovered against the now plaintiff on the 28th day of February, 1855, by the said judgment-creditors, in the said Court of Common Pleas, for the said sum of 1455*l.* 2*s.* 4*d.*,—which debt is still unsatisfied, and which order still remains in full force.*

The plaintiff joined issue on the first, second, and third pleas, and to the 4th plea replied that, by the order in that plea mentioned, it was further ordered that the defendant, his attorney or agent, should attend the said judge at his chambers in Rolls Gardens, Chancery Lane, on Friday, the 2d day of November then next, at 8 of the clock in the afternoon, to show cause why he should not pay the said judgment-creditors the debt due from him to the plaintiff, or so much thereof as might be sufficient to satisfy the said judgment-debt; whereupon the defendant, at the day and time aforesaid, appeared before Sir Cresswell Cresswell, one of the judges of the said Court of Common Pleas, who, upon hearing the attorneys or agents for the defendant and the judgment-creditors, ordered that the judgment-creditors should be at liberty to proceed against the defendant by writ, according to the statute in such case made and provided: and the plaintiff said that *the said* [538 **judgment-creditors thereupon, and before this suit, elected not to proceed against the defendant by writ or according to the said liberty given to them by the said last-mentioned order, but to relinquish and abandon, and they did relinquish and abandon, all further proceedings in the matter of the said attachment,—whereof the defendant, before this suit, had notice.*

The plaintiff also demurred to the fourth plea,—the ground of demurrer stated in the margin being, “that the said fourth plea is not a good plea in bar; and, if good at all, could be good only as a plea in abatement.

The defendant took issue on the replication to the fourth plea, and joined issue on the demurrer; and he demurred to the replication to the

fourth plea,—the ground of demurrer stated in the margin being, “that the said replication does not allege that the judgment-debt has been satisfied, and that the fact of the judgment-creditors having elected not to proceed against the defendant is no answer to the fourth plea.” Joinder.

*539] *Phipson*, for the plaintiff.(a)—The question raised by *these demurrers turns upon the construction of what are called the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. The 60th section enacts that “it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him, before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents; and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act.” The 61st section enacts, that “it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt.” Section 62 enacts that “service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, *shall bind such debts in his hands.*” Section 63 enacts, that, *540] “if the garnishee does not forthwith pay into court the amount due from him to the judgment-debtor, or an amount equal to the

(a) The points marked for argument on the part of the plaintiff, were,—

“That service of an order attaching a debt, and binding such debt in the hands of the garnishee, is not an absolute discharge of such debt as against the judgment-debtor, so as to be a bar to his recovering such debt.

“That, when the garnishee disputes his liability, and the judgment-creditor has obtained an order to be at liberty to proceed against the garnishee, and has elected not to proceed against the garnishee, who has notice of such election, the judgment-debtor may sue the garnishee for the debt.

“That service of an order attaching a debt does not bind a defendant in perpetuum, if the judgment-creditor takes no further step in the matter.

“That the binding effect of such order, and of the service thereof, is at most equal to the effect of the pendency of another action for the same cause, and is at most the subject of a plea in abatement.”

judgment-debt, and does not dispute the debts due or claimed to be due from him to the judgment-debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment-debt." Section 64 enacts that, "if the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment-creditor shall be at liberty to proceed against the garnishee by writ calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment-debtor, if less than the judgment-debts, and for costs of suit; and the proceedings upon such writ shall be the same, as nearly as may be, as upon a writ of revivor issued under the Common Law Procedure Act, 1852," s. 131. And section 65 enacts that "payment made by or execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment-debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed." The question is, what is the meaning of the words of s. 62, "shall bind such debts?" The same expression is used in the 16th section of the statute of frauds, 29 Car. 2, c. 3; and upon that there have been numerous decisions that it means no more than "operative between the parties,"—preventing the defendant from parting with the land or the goods: *Giles v. Grover*, 1 Cl. & Fin. 72, 9 Bingh. 128, 2 M. & Scott, 197 (E. C. L. R. vol. 28); (a) *Samuel v. Sir J. Duke*, 3 M. & W. 622; † *Hunt v. Hooper*, *12 M. & W. 664; † the property was altered only by the *sale*. [*541. There can be no reason why the same principle of construction should not be applied to this statute, and why the 62d section should not be so construed as to prevent the garnishee from dealing with the debt to the prejudice of the creditor obtaining the order, so long as the order shall continue operative. [WILLIAMS, J.—If the course pointed out by the statute is pursued, the debt of the garnishee will be merged in the judgment.] The statute meant to give a benefit or privilege to the judgment-creditor. May he not if he pleases abandon the order he has obtained? Is he bound to try a disputed liability? An execution-creditor may always, by giving notice to the sheriff, abandon a *fi. fa.*: *Hunt v. Hooper*, 12 M. & W. 664. † [JERVIS, C. J.—Ought not the plaintiff to have gone before the judge to get the order rescinded?] He was not bound to do so. The order had not the effect of changing the property: *Holmes v. Tutton*, 5 Ellis & B. 65 (E. C. L. R. vol. 85). Lord Campbell, in giving judgment, there says,—“We do not see why the expression ‘bind’ in this place should have a stronger effect, as against the provisions of the bankrupt act for the general equitable dis-

(a) In Dom. Proc., affirming the judgment of the Exchequer Chamber in *Giles v. Grover*, 1 Y. & J. 232. †

tribution of the effects of a debtor, against his original creditor, than the operation of the judgment had at common law, or than the delivery of the writ to the sheriff had since the statute of frauds; and the using the same expression 'bind' as is used in the statute of frauds to describe the effect which the judgment previously had, and which the delivery of the writ to the sheriff was thereafter to have, seems rather to lead to the inference that the legislature had no intention of giving the service of the order a greater effect in this respect than the delivery of the writ to the sheriff had under the statute of frauds: in the one case, the goods were bound in the hands of the sheriff; in the other, the debt is to be bound in the hands of the garnishee." If the order does not change *542] the property, *it is unnecessary, where the judgment-creditor gives notice that he abandons it, to go to a judge to get it rescinded. Suppose the judgment-creditor were to execute a release by deed, would the order then cease to "bind" the debt? If it would, why should not the simple act of relinquishment have the same effect? Under the old proceedings by foreign attachment in London, a judgment against the garnishee did not of itself bar the original debt. In *Com. Dig. Attachment*, (H.), it is said "A judgment in attachment is no bar, unless it be executed,"—citing Dyer, 83 a.(a) It is true the analogy between the two modes of proceeding is not perfect; but it throws some light upon the subject. The order, it is submitted, binds the debt only so long as it is in force; but the order cannot be considered to be in force when the judgment-creditor has relinquished and abandoned it, and given notice of such relinquishment.

Lush, contra.—There is no analogy whatever between the proceedings by attachment in the Lord Mayor's Court, London, and those under the statute in question. The former are regulated by the custom, the latter are the creation of the statute. The 62d section expressly provides that the order shall bind the debt in the hands of the garnishee. The fourth plea states that Brown and Ballantine recovered a judgment *543] against the *plaintiff, and, being such judgment-creditors, applied for and obtained an order under s. 61, that the debt due from the now defendant to the plaintiff should be attached to answer the judgment so recovered against the plaintiff by Brown and Ballantine, and that the debt is still unsatisfied, and the order still remains in force. [CRESSWELL, J.—The plea does not state that the order was served, or that the defendant had notice of it.] The plea is certainly defective in

(a) *Robertson et Ux. v. Norroy King-at-Arms*. "Memorandum, that, upon a matter in dispute between Mr. Robertson and his wife and Norroy King-at-Arms, R. Brooke, Serjeant of the law, recorder of London, certified in writing, that, if a man sue another before the mayor, &c., and a third person is indebted to the defendant in as much as the suit of the plaintiff is for, and by the custom of the law of attachment the third person is condemned, and judgment given against him, notwithstanding the judgment, if no execution be sued out against the third person, the plaintiff may resort back to have judgment and execution against the defendant, who is his principal debtor; and he may also sue the third person for his debt notwithstanding the judgment unexecuted, &c."

that respect. [JERVIS, C. J.—That relieves us from the necessity of putting a construction upon the statute.] If there had been no demurrer to the plea, the defect would have been cured by the replication, which amounts to no more than a statement that the judgment-creditors had forborne to go on against the garnishee. The defendant is at all events entitled to judgment on the demurrer to the replication. [WILLES, J.—In Com. Dig. *Pleader*, (M. 2), I find it laid down, that, “if the plea is naught, and the replication likewise, and the defendant demurs, judgment shall be for the plaintiff, for, the first fault was in the plea,—*Woodward v. Robinson*, 1 Stra. 302: vide Dougl. 94, to the same effect.”] [CRESSWELL, J.—You cannot eke out a bad plea by importing into it something which appears in the replication.]

JERVIS, C. J.—There must be judgment for the plaintiff on the demurrer to the fourth plea, because the plea is defective in the respect pointed out, and also judgment for the plaintiff on the demurrer to the replication, because the first fault is in the plea: therefore, we must give judgment for the plaintiff on the whole record.

The rest of the court concurring,

Judgment for the plaintiff.

*MANBY v. WITT. *June 9.*

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EASTMEAD v. WITT.

The defendant having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each (in the absence of the other) that he (or she) was discharged because *both* had been robbing him; whereupon each brought an action for the words so spoken to the other:—Held, a privileged communication.

THESE were actions for defamation tried before Willes, J., at the sittings in Middlesex after the last term.

The facts in each case were substantially the same. It appeared that Manby was footman and Eastmead cook in the service of the defendant, who was a married man. Returning home late one night, the defendant heard that the footman had been giving away some provisions which he had obtained from the cook, and thereupon he gave them both notice to quit his service. On the following morning, Manby and Eastmead presented themselves together to the defendant, and asked him his reason for dismissing them. The defendant declined at that time to give any reason; but, upon Manby's coming to him afterwards to make the same inquiry, the defendant told him that he discharged him “because he and the cook had been robbing him;” and he afterwards told Eastmead that he discharged her “because she and the footman had been robbing him.” It was for this slander that the actions were brought.

In order to rebut the presumption of privilege arising from the occasion of the speaking of the words, evidence was given to show that the defendant had not assigned his true motive for dismissing the plaintiffs,

but that the real cause was, that certain alleged improper familiarities between the defendant and the housemaid had been made the subject of conversation in the kitchen: and the learned judge was asked to leave it to the jury to say whether the defendant had not been actuated by express malice in speaking the words.

*545] *On the part of the defendant it was insisted that the statements made by him came within the rule as to communications protected by the occasion, and that there was no evidence to leave to the jury so as to rebut that privilege.

The learned judge said, that, if both the plaintiffs had been present when the words were spoken, he should have directed a nonsuit in each case. He also inclined to think that the occasion was equally privileged though the words were spoken to each in the absence of the other; but he thought it better to reserve the point, and to take the opinion of the jury as to the damages they thought the plaintiffs entitled to, assuming that the words were not privileged.

The jury assessed the damages at 25*l.* in each case.

Watson, on a former day in this term, pursuant to the leave reserved to him at the trial, obtained in each case a rule nisi to enter a nonsuit.

Byles, Serjt., now showed cause.—To make the words spoken on this occasion excusable on the ground of privilege, the defendant was bound to show that he was influenced solely by the reason he assigned for the dismissal of the plaintiff. If he was induced partly by that motive, and partly by feelings of revenge for the statements the parties had made respecting him, that would have been evidence of malice which ought to have been submitted to the jury. [JERVIS, C. J.—You assume impropriety of conduct on the defendant's part, and on that you seek to raise an inference of malice. WILLIAMS, J.—Besides, it does not appear that there was any evidence that the defendant knew that the servants had been talking in the manner you suggest.] There was, at all events, enough to entitle the defendant to have that question left to the jury.

*546] If the charges *had been made in the presence of both, it may be conceded that that would be privileged, according to the principle of the decision in *Somerville v. Hawkins*, 10 C. B. 583 (E. C. L. R. vol. 70), where the defendant had dismissed the plaintiff from his service on suspicion of theft, and, upon the latter coming to his counting-house for his wages, the defendant called in two other of his servants, and, addressing them in the presence of the plaintiff, said,—“I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him:” and it was held that this was a privileged communication; for, that it was the *duty* of the defendant, and also his *interest*, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, inasmuch as such association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and

to the defendant himself. [WILLIAMS, J.—The rule is similarly laid down about the same time by the Court of Queen's Bench in *Taylor v. Hawkins*, 16 Q. B. 808 (E. C. L. R. vol. 71), where it was held, that, if a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away privilege from words which the master then uses, imputing the dishonesty; and that, no further proof being offered by the plaintiff to show malice, the judge ought not to have left the question of malice to the jury.] It may be conceded that there the occasion justified the speaking, and that the privilege was not taken away by the presence of the third party. But here, when dismissing Eastmead for robbing him, the defendant had no right to tell her that the plaintiff Manby also had been guilty of felony. [JERVIS, C. J.—Communications of this sort are privileged on the ground of duty towards the servant, or of interest on the part of the master. When asked *by the cook his reason for dismissing her, he was bound to tell her the whole charge. If he [*547 had not done so, he would have very imperfectly performed his duty, inasmuch as he would be suppressing the party's means of answering the charge; and so he might have laid himself open to an imputation of malice.] In *Toogood v. Spyring*, 1 C. M. & R. 181,† what was said in the presence of the servant was held to be privileged: but the learned judge who tried the cause ruled that the act of making the imputation to the plaintiff in the presence of another person (not the plaintiff's employer) gave the plaintiff a right to maintain the action. [CRESWELL, J.—That was the case of a communication to a third person in no way connected with the transaction. But here what was said to each was part of and inseparably connected with the charge against the other.] The very essence of the justification was the master's motive: and, if that had been left to the jury, there could have been but little doubt as to the result.

Watson and *Tindal Atkinson* were not called upon to support the rule.

JERVIS, C. J.—I am of opinion that there was no evidence of malice in this case which ought to have been left to the jury. The malice that will deprive a communication of this sort of the excuse arising out of the occasion of the speaking of the words must be such as to induce the court, or any reasonable person, to conclude that the occasion has been taken advantage of to give utterance to an unfounded charge. Now, as to the charge itself in this case, my Brother *Byles* almost feels himself compelled to admit, not only that the defendant was right in pursuing the course he did, but that he was bound, when he accused the cook of robbing him, to tell her with whom she was charged with having acted: *and so, in the other case, when he charged the present plaintiff [*548 with robbing him, he was bound to name his accomplice. I think my Brother *Willes* should have nonsuited the plaintiffs.

The rest of the court concurring,

Rule absolute.

EASTON v. NEVILLE. *May 31.*

An attorney not appearing pursuant to a rule calling on him to answer the matters of the affidavit, on being called three times in open court, a writ of attachment was ordered to be issued against him.

ATHERTON obtained a rule calling upon Mr. John George Stoker, the defendant's attorney in this cause, one of the attorneys of this court, upon notice of the rule to be given to him, on a day named therein, to answer the matters contained in the affidavits upon which the application was forwarded.

On the 11th of June, the attorney not appearing, on being called three times in open court, he was adjudged to be in contempt, and it was ordered that a writ of attachment be issued forth against him for the same.(a)

Rule accordingly.

(a) This is in accordance with the practice of the Court of Queen's Bench.

*549]

*GREEN v. KOPKE. *May 27.*

Where a contract in writing for the sale of goods is entered into by one who describes himself as agent, and as making the contract "as agent, and on behalf of" his principal, naming him,—the party so making the contract is not personally liable.

In each case it is a question of intention, to be gathered from the terms of the contract; and, whether the principal be an Englishman resident in this country or a foreigner residing abroad, makes no difference.

THIS was an action brought by the plaintiff, a merchant in London, against the defendant, who was the agent of one Roos, a merchant at Gothenburg, to recover damages for the breach of a contract for the sale of a quantity of tar.

The cause was tried before Alderson, B., at the last Spring Assizes for the county of Surrey. It appeared that the contract was made by the defendant (who was agent for one Roos, of Gothenburg, and who was duly authorized to make the contract for him), by means of bought and sold notes, which were as follows:—

"London, 10 August, 1855.

"Bought, *through Mr. H. Kopke*, of Mr. Leonard Roos, Gothenburg, for shipment from Umed or Hernosand, about 1000 barrels of good Swedish tar, at 23s. (say, three and twenty shillings) per barrel free on board at the shipping place, including Sound-dues and freight to London; 3 per cent. being allowed for filling. The freight to be paid according to charter, and the net amount of invoice by buyers' acceptance at four months' date from date of bill of lading, and on handing of shipping documents, and payable in London. The shipment to take place in this or the next month.

"J. GREEN & Co."

"London, 10 August, 1855.

"Sold, on behalf of *Mr. Leonard Roos, Gothenbury*, to Messrs. John Green & Co., Sunderland, for shipment from Umed or Hernosand, about 1000 barrels of good Swedish tar, at 23s. (say, twenty-three shillings) per *barrel free on board at the shipping place, including Sound-dues and freight to London; 8 per cent. being allowed for filling. [*550 The freight to be paid according to charter, and the net amount of invoice by buyers' acceptance at four (4) months' date from date of bill of lading, and on handing of shipping documents, and payable in London. The shipment to take place in this or the next month.

"H. KOPKE, as agent."

On the part of the defendant, it was insisted, that, as the contract plainly expressed that he was dealing as agent for a principal whose name was mentioned, he was not personally responsible.

For the plaintiff it was submitted, that the fact of the principal being a foreigner entitled him to sue the party making the contract, notwithstanding he was therein described as agent.

The learned judge, expressing no opinion, reserved the point; and, a verdict having been found for the plaintiff,

Bovill, in Easter Term last, obtained a rule nisi to set it aside, and enter a verdict for the defendant. He relied on *Downman v. Jones*, 7 Q. B. 103 (E. C. L. R. vol. 53), *Peterson v. Ayre*, 13 C. B. 353 (E. C. L. R. vol. 76), *Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 83), and *Mahony v. Kekulé*, 14 C. B. 390 (E. C. L. R. vol. 78); and referred to and distinguished *Wilson v. De Zulueta*, 14 Q. B. 405 (E. C. L. R. vol. 68), and *Lennard v. Robinson*, 5 Ellis & B. 125 (E. C. L. R. vol. 85). [*JERVIS*, C. J., referred to the notes to *Thompson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110, in 2 *Smith's Leading Cases*, 311.]

J. Brown now showed cause.—In the case of a contract made by a British agent for a foreign principal, the agent is the person who is primarily liable,—indeed *he is in general the only person liable. [*551 In *Paterson v. Gandasequi*, 15 East, 62, it was held, that, if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal. It is true there was no written contract there, and therefore no doubt it was in some degree a question of evidence. In *Thomson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110, Lord Tenterden says,—“Where a British merchant is buying for a foreigner, according to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner.” That was the case of a purchase; this is a sale: but the same principles must govern both. Personal liability of the agent may no doubt be excluded: but

it is not done in express terms here. In Story on Agency, § 266, it is said that "a person contracting as agent will be personally responsible where at the time of making the contract he does not disclose the fact of his agency, but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly that credit is given to him on account of the contract. Thus, a factor, or broker, or other agent buying goods in his own name for his principal, will be responsible to the seller therefor in every case where his agency is not disclosed. But we are not therefore to infer, that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and agent may both be severally liable upon the same contract." Again, § 267, "The same principle will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not *552] disclosed; for, until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent, and trusting to an unknown principal, who may be insolvent, or incapable of binding himself. Thus, where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal, on whose behalf the commodity is sold, the auctioneer will be liable to the purchaser to complete the contract, although, from the nature of public sales, it is plain that he acts as agent only. So, if the agent should, at the time of the purchase of the goods, acknowledge that he is purchasing for another person, but should not then name him; in such a case he would be held personally liable, though the principal, when discovered, might also be liable for the debt." Again, § 268, "It is partly upon this ground, and partly upon the ground of general convenience, and the usage of trade, that the general rule obtains, *that agents or factors acting for merchants resident in a foreign country* (as, for example, in France or Germany), *are held personally liable upon all contracts made by them for their employers; and this without any distinction whether they describe themselves in the contract as agents or not.* In such cases, the ordinary presumption is, that credit is given to the agents or factors; and, not only that credit is given to the agents or factors, but that it is exclusively given to them, to the exoneration of their employers." And in a subsequent section,—290,—it is said:—"There are cases in which the presumption of an exclusive credit being given to an agent is so strong as almost to amount to a conclusive presumption of law. Thus, for example, where a known factor buys or sells goods for his principal, who is resident in a foreign country, as, for example, in France or Germany, it will be presumed, in the absence of all rebutting *553] circumstances, that credit is given exclusively to the factor in the whole transaction, and that he is dealt with as the principal.

This doctrine may be satisfactorily explained, in many cases, by the consideration already stated, that there is no other known responsible principal. But it is founded upon a broader ground, viz. upon the presumption that the party dealing with the agent intends to trust one who is known to him, and resides in the same country, and is subject to the same laws as himself, rather than to one who, if known, cannot, from his residence in a foreign country, be made amenable to those laws, and whose liability may be affected by local institutions and local exemptions which may put at hazard both his rights and his remedies. A fortiori, the doctrine will apply to an agent acting for an unknown principal in a foreign country." In the note, reference is made, amongst other cases, to *De Gaillon v. L'Aigle*, 1 B. & P. 369, where Eyre, C. J., says,—“I am not aware that I have ever concurred in any decision in which it has been held, that, if a person, describing himself as agent for another residing abroad, enter into a contract here, he is not personally liable on the contract.” [JERVIS, C. J.—How do you distinguish this case from *Mahony v. Kekulé*, 14 C. B. 390 (E. C. L. R. vol. 78)? That case seems to me to be precisely in point.] The first observation that arises upon that case, is, that the contract in the commencement of it purports to be made inter partes,—“between Messrs. Vacher & Tilly, Morlaix, and Matthew Mahony, London,” and not between Mahony and Kekulé; and this circumstance is relied on by the court in giving judgment. [JERVIS, C. J.—In every case it is a question of intention. In that case, taking the whole agreement together, it was manifest that the defendant was contracting as agent only. WILLIAMS, J.—If this had been an English contract, who would have been liable, the principal or the *agent?] If this had been an English contract, the principal unquestionably would have been bound by it. [JERVIS, C. J.—We have in effect decided that it makes no difference whether the principal be an Englishman or a foreigner resident abroad: in either case, it is equally a question of intention.] It is competent to the plaintiff to import into the construction of this contract the well-known rule of law, that an agent contracting for a foreign merchant may be treated as the principal. [JERVIS, C. J.—As a matter of law, no such rule exists. That is all explained, and the doctrine of Story controverted, in 2 Kent's Comm. 630, where the rule is thus laid down,—“It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that, where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power. If he makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable, not even though he should take a

note for the goods sold, payable to himself. But, if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal, in case the agent had authority to bind him." (a) And the following is appended in a note,—“Mr. Justice Story, in his Treatise *on Agency, §§ 268, 290, lays down the rule that agents or *555] factors for merchants residing in *foreign countries*, are personally liable on contracts made by them for their principals, and this without any distinction whether they describe themselves as agents or not. The legal presumption is that the credit is given to the agent exclusively. The Supreme Court of New York, in *Kirkpatrick v. Staines*, adhered, however, to the old rule, and held that the agent was not personally responsible when he appeared in the transaction as an agent only, and dealt with the plaintiff in that known character. The court held that *there was no distinction known to our law on this point, between an agent acting for a foreign and a domestic house*. This decision was affirmed in the Court of Errors, in December, 1839. Mr. Senator Verplank gave the opinion of the Court of Errors, and he examined the question with learning and ability. He held that there was no general presumption known to our law and commercial usages, that the credit in such cases was given exclusively to the agent, and that the English *556] cases on which the presumption as a settled *rule of law was deduced in the treatise referred to, were of recent origin, and founded on special or local usage in England, and one not adopted here. He cited *Eyre, C. J., in De Gaillon v. L'Aigle*, 1 B. & P. 368; *Bayley, J., in Paterson v. Gandasequi*, 15 East, 70; *Lord Tenterden, in Thomson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110; *Lloyd's notes to Paley on Agency*. He questioned the policy of the rule that credit on sales or consignments was not presumed to be given to well established foreign houses, but to temporary agents in exoneration of their principals; and that, until the course of business had established such a rule here as well known in mercantile usage and practice, it was wisest to adhere to the general law of agency, holding the known principal responsible when the agent discloses his name, and acts

(a) The following are the authorities cited.—*Emerigon, Traité des Ass. tome ii. p. 465*; *Lord Erskine*, 12 Ves. 352; *Davis v. McArthur*, 4 Greenleaf's Rep. (American), 83, n.; *Owen v. Gooch*, 2 Esp. N. P. C. 567; *Ware, J., in the case of The Rebecca*, Ware's Rep. (American), 205; *Roberts v. Austin*, 5 Wharton (American), 318; *Thomas v. Bishop*, 2 Stra. 955; *Leadbitter v. Farrow*, 5 M. & Selw. 346; *Dusenbury v. Ellis*, 8 Johns. Rep. (American), 50; *Parker, C. J., Stackpole v. Arnold*, 11 Mass. Rep. (American), 29; *Hastings v. Lowring*, 2 Pick. Rep. (American), 221; *Hampton v. Speckenagle*, 9 Serg. & Rawle (American), 212; *Short v. Skipwith*, 1 Brokenbrough's Rep. (American), 103; *Livermore on Agency*, ch. 8; *Paley on Agency* (by Lloyd); *Story on Agency*, ch. 8; *Rathbone v. Budlong*, 15 Johns. Rep. (American), 1; *Goodenow v. Tyler*, 7 Mass. Rep. (American), 36; *Greely v. Bartlett*, 1 Greenleaf's Rep. (American), 172; *Corlies v. Cumming*, 6 Cowen's Rep. (American), 181; *Zacharie v. Nash*, 13 Louisiana Rep. (American), 20; *Mills v. Hunt*, 20 Wendell Rep. (American), 431; *Newball v. Dunlop*, 2 Shepley (American), 180 (or Maine Rep. vol. 14, p. 180); *Mauri v. Hefferman*, 13 Johns. Rep. (American), 58; and *Seaber v. Hawkes*, 5 M. & P. 549.

avowedly and authorizedly on his behalf, and leaving it to the discretion of the American trader to obtain the security of the factor or agent, when he judges it best."] The Lord Chief Justice, in *Mahony v. Kekulé*, puts it rather as a rule of evidence. [JERVIS, C. J.—So it is, in truth.] In *Wilson v. De Zulueta*, 14 Q. B. 405 (E. C. L. R. vol. 68), the defendant was held liable upon an agreement entered into by him, "in behalf and representation of Parejo, of Havana," with the plaintiff. [JERVIS, C. J.—It is treated entirely as a question of intention there.] In *Lennard v. Robinson*, 5 E. & B. 125, a charter-party stated that it was agreed between Lennard, owner of the ship *Nicholas Smith*, then at Genoa, and "Robinson and Fleming, of London, merchants," that the ship should proceed to Torreveja, and there load from the factors of the said merchants a cargo "to be brought to and taken from alongside at merchants' risk and expense, which the said merchants hereby bind themselves to ship," and should proceed to Memel, and deliver, on paying freight: "thirty running days to be allowed the said merchants" for loading and discharging, *and [557 ten days on demurrage at 4*l.* per day. The charter-party was signed "by authority of, and as agents for Mr. A. H. Schwedersky, of Memel," Robinson & Fleming. In an action by Lennard against Robinson & Fleming, the declaration set out the charter-party, and averred that Schwedersky was a foreigner, not a subject of this realm, residing beyond the seas, to wit, at Memel, and claimed from the defendants demurrage and damages for detention ultra. The defendants pleaded that the agreement was entered into by the defendants by the authority of, and for and on behalf of, and as agents for, Schwedersky, and not otherwise; and that he was named to and known by the plaintiff as being the defendants' principal at the time the agreement was made: and it was held, on demurrer, that the plaintiff was entitled to judgment, *the terms of the charter-party showing that the defendants contracted personally*. Lord Campbell said: "I do not attach much weight to the fact that the alleged principal is a foreigner; for, a part of the contract was to be performed in Memel, where he resides, and none in England, where the defendants reside. But, looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract, they are contracting parties: and they may well become so 'by authority of, and as agents for,' their employer: that is, he may be made liable to them. That, however, does not alter the effect of the instruments by which they become contracting parties as between themselves and the plaintiff." So, in *Leedham v. Baxter*, 26 Law Times, 285, after issue joined in an action, an agreement, headed in the action, was signed by the plaintiff's and the defendant's attorneys, and by the defendant himself, providing that the record should be withdrawn, the defendant execute an assignment to

*558] the plaintiff by way of security, and if *through the wilful default of the defendant the agreement should not be carried out, the plea of the defendant should be withdrawn by the defendant's attorneys, and all costs be paid by the defendant: and it was held, that the defendant's attorneys were personally liable in an action against them *for not withdrawing the plea*, the agreement not having been carried out through the wilful default of the defendant. Here, reliance is placed on the presumption arising from the fact of the principal being a foreigner, as well as upon the absence of all expression of intention on the face of the contract to exclude the personal liability of the agent. Some of the cases, it is true, seem to treat it as a question of contract or as a rule of evidence: and this notion is adopted by Chancellor Kent. Dr. Story, on the other hand, treats it as a presumption of law. This is not unlike the case of an attorney's undertaking: *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53). [*WILLES, J.*—*Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 83), shows that it is matter of contract.]

Bovill and *C. Pollock*, contra, were not called upon.

JERVIS, C. J.—It seems to me to be unnecessary to hear *Mr. Bovill* and *Mr. Pollock*, and that the rule to enter a verdict for the defendant should be made absolute. I apprehend this court laid down the correct rule in the recent case of *Mahony v. Kekulé*, and that it is in every case a question of intention to be gathered from the contract itself and the surrounding circumstances. No doubt, as has been said by learned judges more than once, the fact of the principal being a foreigner is entitled to some weight; but there is no rule of law, as is suggested by *Mr. Brown*, that the agent is in all cases liable personally where the principal is a foreigner residing abroad. It is in all cases a *559] question of intention, capable of being explained by the *custom or usage of trade where any such can be shown to exist. There was however, no usage proved here; nor could there be. It is ridiculous to suppose that an agent, for a mere commission of $\frac{1}{2}$ per cent., would guaranty the performance of a contract for the sale of 1000 barrels of tar. Chancellor Kent, in his very valuable Commentaries, puts it on the ground on which we now put it, and, in the passage to which I referred in the course of the argument, qualifies and repudiates to that extent the doctrine laid down by Dr. Story. It is admitted, that, if this had been the case of an English principal, the principal and not the agent would have been liable. That admission seems to me to put the plaintiff out of court; for, *Mr. Brown* must say, that *Roos*, the principal, if he came to this country, could not be sued; he cannot contend for a co-existing personal liability in both. I am clearly of opinion that the correct rule is as I have stated; that it is a question of intention; and that, upon the fair construction of this contract,

the defendant intended to contract only as agent, and is not personally liable.

WILLIAMS, J.(a)—I am of the same opinion. In the case of a contract of sale without writing, the party making the contract *may* be personally liable, notwithstanding he mentions at the time that he is buying for a foreign principal. This is the case of a contract in writing, which is to be construed according to the intention of the parties as evidenced by the words they have used. In order to arrive at a correct construction of it, we may also have recourse to the surrounding circumstances; one of which is, that the defendant is an agent, acting for a principal who is known. I think it is impossible to hold him personally liable.

*WILLES, J.—I also am of opinion that this rule should be made absolute. Whether the defendant contracted as agent or [560 not, is a question of fact,—as Parke, B., says, in *Heald v. Kenworthy*, 10 Exch. 739, 743,†(b)—and not a conclusion of law. If a broker buys goods for a merchant, naming him, and stating that he lives in Australia, unless he at the same time stated that he was buying *only as agent*, the jury would be warranted in holding him to be personally liable. There is another class of cases, where custom may intervene and qualify the contract, so as to make the party resident in this country liable personally, though acting for a known foreign principal. But, where the contract is reduced into writing, we must gather from its contents what was the intention of the parties: and here the question is, whether the defendant so expressly contracts as agent as to exclude his personal liability. I strongly incline to think that no such custom exists as that suggested, and to establish which there was a fruitless attempt recently in the Court of Queen's Bench. Without saying whether, if such custom existed, it would be excluded by the terms of this contract, it is enough to say that I am clearly of opinion that the terms here used show that the defendant contracted as agent, and as agent only.

Rule absolute.

(a) Cresswell, J., was absent.

(b) "The question of his liability is one of fact. Where the seller deals with an agent resident in this country and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact, and not of law."

To the American cases cited in the *Miller*, 6 B. Monroe, 612; *Andrews v. note* to p. 554 may be added *Hall v. Allen*, 4 Harring. 452; *Rogers v. Huntoon*, 17 Vermont, 244; *Chase v. March*, 38 Maine, 106; *Johnson v. Debolt*, 2 Gilman, 371; *Hunter v. Smith*, 21 Conn. 627.

*561]

*ROBERTS v. BRETT. *June 10.*

By agreement dated the 15th of May, 1855, the plaintiff covenanted *forthwith* to procure a vessel and stow on board a certain telegraphic cable then at M.'s wharf, and to rig, provision, and man her, and to have her ready for sea at the Nore on or before the 15th of July: and the defendant covenanted to pay the plaintiff 5000*l.* by instalments,—1000*l.* seven days after the arrival of the vessel at M.'s wharf, 2000*l.* on or before the expiration of twenty-one days after the vessel should have arrived alongside M.'s wharf, and the remaining 2000*l.* as soon as the ship should put to sea from the Nore, and also to give the plaintiff 500 shares in a certain company. It was also mutually agreed that each party should, within ten days of the execution of the agreement, give and execute to the other a bond with two sureties, in the sum of 5000*l.*, for the due performance of the covenants on his part.

In an action upon this agreement, the breaches assigned being, non-payment by the defendant of the 5000*l.*, or any part thereof, and non-delivery of the shares:—

Held, that the execution of the bond by the plaintiff was a condition precedent to his right to sue for such breaches.

THE declaration stated, (a) that, by a certain indenture made between the plaintiff of the one part, and the defendant of the other part, and bearing date the 15th of May, 1855, the plaintiff, for the considerations therein mentioned, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors and administrators, in manner following, that is to say,—“That he, the plaintiff, should and would *forthwith*, at his own expense, procure the Cornwall frigate, or some other suitable ship or vessel, and should and would (unless prevented by fire, tempest, or the Queen's enemies) stow or cause to be stowed on board the said ship or vessel the submarine telegraphic cable, which was one hundred and fifty miles in length, or thereabouts, and was then at Morden's Wharf, East Greenwich, in the county of Kent (in the said indenture afterwards, for the sake of distinction, called the African and Sardinian cable).” Then followed covenants on the part of the plaintiff,—to provision and rig the vessel,—to provide and pay competent officers, crew, and workmen, breaks, rollers, &c., to lay down the cable,—“and should and would (unless prevented as aforesaid) do and perform all the several acts thereinbefore covenanted to be performed by *562] him, the plaintiff, and have the said *ship fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th day of July then next,”—to proceed *forthwith* to Cape Tabaque,—to lay down the cable,—to provide steam-tugs, &c.,—to discharge and lay down a certain other cable, &c.,—“and it was in and by the said indenture provided always, that, if the plaintiff should (unless prevented as aforesaid) make default in having the said ship, with the said cable or cables on board, as the case might be, at the Nore, fully equipped and ready for sea, on or before the said 15th day of July then next, the defendant, his heirs, executors, or administrators, should be at liberty to retain from any moneys payable by him or them under the covenants for that purpose thereinbefore contained, as and for liquidated damages, in respect of such default, the sum of 200*l.* per week,” &c. It then

(a) See the declaration more fully set out, 17 C. B. 534 (E. C. L. R. vol. 84).

proceeded to state, that, by the said indenture, for the consideration therein mentioned, the defendant did further, for himself, his heirs, executors, and administrators, covenant with the plaintiff, his executors and administrators, in manner following, that is to say,—“that he, the defendant, his heirs, executors, and administrators, should and would, subject to such rights of deduction therefrom as thereinbefore mentioned, pay the plaintiff, his executors and administrators, the sum of 5000*l.* sterling, by the instalments and at the times next thereafter mentioned, that is to say, *the sum of 1000*l.*, part thereof, on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid; the sum of 2000*l.*, further part thereof, on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid; and the sum of 2000*l.*, the remainder thereof, when and so soon as the said ship should put to sea from the Nore, one half of such last-mentioned sum to be paid in cash, and the other half thereof by the defendant, his executors or *administrators, accepting a bill of exchange at three months' date, to be drawn upon him or them by the plain-* [*563
tiff, his executors or administrators,”—that he would, on or before the expiration of twenty-one days from the time when the said African and Sardinian cable should have been laid down, deliver to the plaintiff 500 paid up shares of 10*l.* each in the Mediterranean Submarine Electric Telegraph Company,—and that he would pay a sum to be agreed on for laying down the other cable: “And it was thereby agreed and declared, that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under those presents, the plaintiff and two responsible sureties should, *within ten days of the execution of those presents*, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5000*l.*, and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, within ten days from the execution of those presents, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000*l.*: and it was in and by the said indenture provided always and thereby expressly agreed and declared, that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff, his heirs, executors, and administrators, and of the defendant, his heirs, executors, or administrators, under or by virtue of those presents.”
 Averment of performance by the plaintiff of the terms of the agreement on his part, and readiness and willingness to receive the cable on board; and, further, “that he has performed and fulfilled all conditions precedent on his part to be performed and fulfilled, and everything has taken place and happened to entitle the plaintiff to *a performance by
 the defendant of the said indenture and all the said conditions, [” [*564

covenants, and stipulations therein contained on his the defendant's part to be performed and fulfilled,—of all which several premises the defendant always had full knowledge and notice, and was from time to time requested by the plaintiff to stow on board the said ship the said cables on the terms and for the purposes aforesaid, and also to inspect the said breaks and rollers so provided by the plaintiff as aforesaid; for the doing and accomplishing of all which several matters and things a reasonable time had elapsed before the commencement of the suit.” Breach, that “the defendant did not nor would stow or allow to be stowed on board the said ship the said African and Sardinian cable and the said other cable, or either of them, or any part thereof, but wholly neglected so to do, and therein made default; and did not nor would pay to the plaintiff the said sum of 5000*l.*, or any part thereof, or pay to the plaintiff any moneys whatsoever on account of the said contract; and the defendant did not nor would deliver, or cause to be delivered to the plaintiff, or his nominee or nominees, the said 500 paid up shares in the said Mediterranean Submarine Electric Telegraph Company, of 10*l.* each, or any of them; and the defendant did not nor would, although he did, before the commencement of this suit, require the plaintiff to lay down the said other cable, and a certain sum, to wit, 2000*l.*, was then agreed upon between the plaintiff and the defendant to be the sum to be paid by the defendant to the plaintiff for laying down the said other cable, pay the said sum of 2000*l.* to the plaintiff, or any part thereof, according to the said covenant in that behalf; and the said several sums of 5000*l.* and 2000*l.* remain respectively due and unpaid to the plaintiff, and the said 500 shares remain and are not *565] delivered to the plaintiff, or his *nominee or nominees.” Special damage, that the plaintiff was put to expense, lost profits, &c. And the plaintiff claimed 10,000*l.*

Fifth plea,—that the plaintiff did not, *within ten days from the day of execution of the said indenture*,—such ten days expiring before the said 15th of July, 1856, and before the time when the plaintiff placed the said ship so provided by him alongside the said Morden's Wharf,—or at any time, give and execute, nor did he within such ten days, or at any time, procure two responsible persons, or any responsible person, as sureties or surety on his behalf, to give and execute, nor did two responsible persons, nor did any responsible person, as such sureties or surety for the plaintiff, then, or at any time, give and execute to the defendant, his executors and administrators, a bond or bonds in the penal sum of 5000*l.* for the true performance by the plaintiff of the covenants by the plaintiff in the said indenture contained, and for securing any penalties which he the plaintiff might incur under the said indenture, according to the meaning and effect of the said indenture.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being,—“that the matter therein set forth does not

amount to a condition precedent to the plaintiff's right to recover in this action." Joinder.

Byles, Serjt., in support of the demurrer.—The declaration discloses an agreement under seal of the 15th of May, 1855, whereby the plaintiff was at his own expense *forthwith* to procure a vessel, and stow on board a telegraphic cable then at Morden's Wharf. That was to be done *forthwith*. The plaintiff covenanted to rig, provision, and man the ship, and to have her ready for sea at the Nore *on or before the 15th of July*, under a penalty of 200*l.* per week. And there is a stipulation *that the plaintiff shall *within ten days of the execution of the agreement* give the defendant a bond in the penal sum of 5000*l.* [*566 for the due performance of the covenants on his part. The defendant covenants to pay the plaintiff 5000*l.* by certain instalments,—1000*l.* *seven days* after the arrival of the vessel at Morden's Wharf,—2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside Morden's Wharf,—and the remaining 2000*l.* as soon as the ship should put to sea from the Nore; and also to give the plaintiff certain shares in a company. The breach is, that the defendant did not stow the cable on board, or pay the 5000*l.*, or any part thereof, or deliver the shares. The plea is, that the plaintiff did not, within ten days from the day of execution of the indenture, give and execute a bond for the due performance of his covenants. The simple question, therefore, that is raised by this demurrer, is, whether or not the giving of such bond by the plaintiff is a condition precedent to the obligation on the part of the defendant to perform the covenant on which the breach is assigned, or any part of it. Now, 1000*l.* was covenanted to be paid *on or before the expiration of seven days after the arrival of the vessel alongside Morden's Wharf*: whereas, the bonds were not to be given until the lapse of *ten days* from the execution of the agreement. The question, therefore, is,—as in *Pordage v. Cole*, 1 Wms. Saund. 319,—whether the giving of the bond by the plaintiff was a condition precedent to the obligation on the defendant's part to pay the 1000*l.* It is enough that the liability to pay the 1000*l.* *may* happen before the time at which it was stipulated that the bond should be given. The case falls within the first rule given in the notes in 1 Wms. Saund. 320 b,—“If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing *which is the consideration of the money, or other [*567 act, is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent.” The case comes also within the third rule,—“Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a

breach of the covenant on the part of the defendant, without averring performance in the declaration." And the well-known case of the negroes,—*Boone v. Eyre*, 1 H. Blac. 273, n. (a), 2 Sir W. Bla. 1312, is referred to. Here, the giving of the plaintiff's bond was only part of the consideration for the performance of the covenants on the part of the defendant. [CRESWELL, J.—If it was an essential part, that third rule will not apply.] The agreement provides that the plaintiff and defendant shall mutually give bonds. Suppose the parties were reversed, would the giving of the bond by the defendant have been a condition precedent?

Horace Lloyd (with whom was *Hugh Hill*), *contra*.—It was obviously the intention of the parties that the interchange of the bonds should precede the performance of the defendant's covenants. The giving of the bond by the plaintiff was an essential part of that which the defendant might have taken into account when he was stipulating for the payment of the instalments of the 5000*l*. Whether it goes to the whole or only to part of the consideration, a breach of it could not be paid for in damages, and therefore it does not fall within the third rule in the notes to *Pordage v. Cole*. In *Ellen v. Topp*, 6 Exch. 424,† by the terms of an indenture of apprenticeship, an infant was placed by his father (who *568] was a *party to the indenture) as apprentice to a master described in the indenture as "an auctioneer, appraiser, and corn-factor," "to learn his art, and with him after the manner of an apprentice to serve." After the making of the indenture, and the commencement of the apprenticeship, the master wholly relinquished the trade of corn-factor; whereupon the apprentice absented himself from his master's service. And it was held, in an action on the indenture, by the master against the father, for the desertion of the apprentice, that the relinquishment by the master of his trade of corn-factor was a good answer to the action,—the exercise of the three trades being an entire and indivisible consideration for the service of the apprentice, and the relative duty to teach the three being a condition precedent. So, in *Graves v. Legg*, 9 Exch. 709,† by a written agreement, the plaintiff contracted to sell to the defendant from 300 to 350 bales of white washed Donskoy fleece wool, laid down at certain ports in England, "deliverable at Odessa during August then next, to be shipped with all despatch, warranted fair average quality; but, should they prove otherwise, to be taken with a fair allowance, to be assessed by Messrs. H. & R., subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped," &c. To an action for the breach of this contract, by not accepting the wools, the defendant pleaded, that the wools were bought, with the knowledge of both parties, for the purpose of reselling in the course of the defendant's business; that wool is an article of fluctuating value, and not saleable until the names of the vessels in

which it was shipped should have been declared according to the contract; and that the plaintiff had neglected to declare the names of the vessels in which the wools were shipped until after an unreasonable time after they had been shipped. *It was held, that the provision in the contract that the names of the vessels in which the wools [569 were shipped should be declared as soon as they had been shipped, was a condition precedent to the defendant's obligation to accept and pay for them, and consequently that the plea was good. These are important authorities: and, whatever observations may have been made or doubts thrown upon the case of *Ellen v. Topp*, none has ever rested on *Graves v. Legg*. In this latter case, Parke, B., says: "In the numerous cases on the subject, in which it has been laid down that the general rule is, to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties, to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged, is, that, where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and, under the new, the denial of such performance would be bad; and the cases of *Campbell v. Jones*, 6 T. R. 570, and *Boone v. Eyre*, 2 W. Bla. 1312, 1315, are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320 d (and the Lord Chief Baron, in delivering the judgment of the court in *Ellen v. Topp*, 6 Exch. 441,† adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that, where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore, the law obliges him to perform the agreement *on his part, leaving him to his [570 remedy to recover any damage he may have sustained in not having received the whole consideration." Now, here, the first payment of 1000*l.* is to be made "on or before the expiration of seven days after the arrival of the vessel at Morden's Wharf;" and the bond is to be given "*within* ten days of the execution of the indenture." It might, therefore, happen that the plaintiff would be bound to give the bond before the arrival of the time at which the payment of the 1000*l.* was to be made: and, if the covenant will admit of that construction, the court will adopt it in order to carry out the evident intention of the parties. In *Staunton v. Wood*, 16 Q. B. 638 (E. C. L. R. vol. 71), in assumpsit on an agreement by the plaintiffs to sell to the defendants cable-bars at a certain price per ton, "the said goods to be delivered

forthwith to the defendants at the works, and the said price to be paid by the defendants in cash in fourteen days from the time of the making of the said contract," the breach alleged, was, non-payment after fourteen days; and, on demurrer to a plea, it was held, that, on the contract thus set forth, the delivery was meant to precede the payment, and that a readiness on the plaintiffs' part to deliver the goods was a condition precedent. [CRESSWELL, J.—The bonds were to be given to secure the mutual performance of the covenants. Suppose a breach of covenant on the plaintiff's part were to take place within the ten days, and the bond were given afterwards, would that bond apply to a covenant already broken? It may possibly aid you in your argument, that the bond must be given before any breach of covenant could occur; otherwise, it never would be that which it professes to be,—a remedy for the non-performance. WILLIAMS, J.—It is difficult to conceive that there could be a breach within the ten days. WILLES, J.—It might perhaps have been alleged that the vessel could not within three days have been *571] got to Morden's Wharf.] What could be the *reason for providing such an interval? [JERVIS, C. J.—The bonds are to be given within ten days after the execution of the indenture, to secure the performance of certain things,—that, on the defendant's part, to secure, amongst other things, the payment of 1000*l.* on or before the expiration of seven days after the arrival of the vessel alongside Morden's Wharf. The parties clearly must have contemplated that the bonds should be given before the payment of 1000*l.* was to be made. It may be asked, what benefit will the plaintiff derive from the defendant's bond, if this be the true construction of the covenant? But, whatever difficulty there may be as to the 1000*l.*, he would at all events have the security of the bond as to the remaining 4000*l.*, and the sum to be agreed on for laying down the additional cable.

Byles, Serjt., in reply.—It is assumed on the other side that the covenant in question contemplates that the bonds shall be security for everything to be done on the part of each. The true construction of the agreement is this,—The vessel is to be alongside Morden's Wharf *forthwith*, and the defendant is to pay 1000*l.* within *seven days*: but within *twenty-one days*, he is to pay a much larger sum, viz., 2000*l.*; therefore he stipulates that he shall have security within *ten days* for the performance of the contract on the plaintiff's part. That, it is submitted, is the fair intention of the parties; and it is consistent with the express words of the covenant. Besides, the bonds may be given as security for past as well as future breaches. See what the plaintiff has done. He has provided a ship, rigged and provisioned her, engaged competent officers, crew, and workmen, with rollers, &c., to pay out the cable, &c. [CRESSWELL, J.—All that may be traversed.] All the essential facts of the case must be taken to be admitted for the purposes of to-day.

[CRESSWELL, J.—Admitted for the sake of *argument only: but you cannot argue that they are admitted, unless you establish [*572 that this is not a condition precedent. WILLIAMS, J.—The difficulty is, that, in the absence of a bond with sureties, the remedy for a breach of contract would be no equivalent.] It cannot be assumed that damages against the party would not be a sufficient compensation. This case clearly falls within the first rule laid down in the notes to *Pordage v. Cole*, which is without qualification. It is also within the third rule. A breach of a contract to convey an estate may be compensated in damages. In *Mattock v. Kinglake*, 10 Ad. & E. 50 (E. C. L. R. vol. 37), 2 P. & D. 343, on an agreement for the sale of lands, the defendant covenanted to pay the purchase-money on a day certain, for and as the consideration of such sale and purchase, with interest from a day certain to the time of “the completion of the purchase:” and it was held, that the covenant by the vendee was an independent covenant, and that the vendor might recover the purchase-money without tendering a conveyance.

JERVIS, C. J.—I am of opinion that the giving of the bond by the plaintiff was a condition-precedent to the obligation on the defendant's part to pay the 5000*l.*, or any part of it; and consequently our judgment must be in favour of the defendant. If we were to act simply on the first rule in *Pordage v. Cole*, that, where a day is appointed for doing an act, and the day is to happen, or *may* happen, before the thing which is the consideration for it is to be performed, the condition is dispensed with,—and were to assume here that the plaintiff was bound at once to begin to prepare the vessel, so that it was certain that the seven days after her arrival alongside Morden's Wharf, when the first payment of 1000*l.* would be due, must expire before the lapse of the period for giving the bonds, we might feel some difficulty in arriving *at the [*573 conclusion we have come to. But, after all, that rule only professes to give the result of the intention of the parties: and, where, on the whole, it is apparent that the intention is, that that which is to be done first is not to depend upon the performance of the thing that is to be done afterwards, the parties are relying on their remedy, and not on the performance of the condition; but, where you plainly see that it is their intention to rely on the condition, and not on the remedy, the performance of the thing is a condition precedent. In the present case, looking at the whole instrument, it seems to me to be manifest that the parties were trusting to the bonds to be mutually given as cross-securities for the performance of the covenants on either side. It *may* be, as my Brother *Byles* suggests, that the seven days provided for the payment of the 1000*l.* may elapse before the expiration of ten days from the execution of the agreement. But it does not follow that the plaintiff would be bound *immediately* to set about the preparation of the vessel. He might, I apprehend, wait until the expiration of the ten

days, and then say, "Give me the bond." That makes the whole thing perfectly consistent; whereas, the contrary construction deprives him of security, which is very different from having a remedy. Then, my Brother *Byles* suggests that the case is within the third rule given in the notes to *Pordage v. Cole*, as to covenants which go only to a *part* of the consideration on both sides, and a breach of which covenants may be paid for in damages. That, however, is not so: money due and money secured by a bond with sureties are very different things. Looking at the whole agreement, I am of opinion that the giving of the bond was a condition precedent, and consequently that the defendant is entitled to succeed upon this demurrer.

*574] CRESSWELL, J.—I also am of opinion that the giving *of the bond was a condition precedent to the plaintiff's right to enforce his remedy for the non-payment of the 5000*l.* at the times stipulated. The essence of the contract is, that the parties shall mutually have remedies for the breach by either of any of the covenants therein. It is true the word "forthwith" occurs at the beginning of the instrument. But, when once you arrive at the conclusion that the giving of the bond is a condition precedent, that gives a meaning to the word "forthwith." As soon as the bonds are given, the plaintiff may be compelled to go on; but not until then. It is evidently used in a very vague sense: it is applied to all the things that are to be done by the plaintiff; and they certainly cannot all be done *immediately*. I feel no difficulty in holding it to have been the plain intention of the parties that each should have the security of the bond of the other for the performance of all the covenants. I think our judgment must be for the defendant.

WILLIAMS, J.—I also am of opinion that the defendant is entitled to judgment on this demurrer. The very nature of the covenants shows that they are not independent covenants.

WILLES, J., concurred.

Judgment for the defendant.

*575] *THE GREAT NORTHERN RAILWAY COMPANY, Appellants; RIMELL, Respondent. *June 10.*

A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed:—

Held, no evidence for the jury of the parcel having been stolen by a servant of the company. On a trial in the county court, the plaintiff having closed his case, it was submitted by the advocate on the part of the defendants that there was no evidence to go to the jury. The judge deciding that there was, evidence was offered on the part of the defendants, and a verdict was ultimately found for the plaintiff:—Held, that the defendants did not by calling witnesses preclude themselves from appealing on the ground that the judge had ruled erroneously.

Where felony is set up as an answer to a defence under the carriers act, 11 G. 4 & 1 W. 4, c. 68, the question of negligence becomes immaterial.

The case of *Butt v. The Great Western Railway Company*, 11 C. B. 140 (E. C. L. R. vol. 78), explained.

THIS was an appeal from a decision of the judge of the Gloucestershire County Court.

The plaintiff (Rimell) claimed 39*l.* 9*s.* for the loss of a parcel containing watches of that value, which had been delivered to the Great Northern Railway Company by the plaintiff, to be carried by them from Gloucester to London, and which were alleged to have been lost through their carelessness and negligence.

The case was stated *by the judge* for the opinion of this court as follows:—

“The following evidence was given at the trial on the 7th of February, 1856:—

“Mr. Helps, for the defendants, pleaded not guilty, and referred to the land carriers act, 11 G. 4 & 1 W. 4, c. 68, ss. 1, 2, 3, 4, 8.

“Samuel Rimell, brother to plaintiff. In his employment. Recollected taking a parcel to the station at Gloucester for Mr. Lutiger, on the 18th of January, 1855. Delivered it to Bossom, a porter at the Great Western Railway, who signed for it; compared the address on the parcel with the book produced.

“Cross-examined. The book was filled up at the shop ready for signature. It was about 8 o'clock at night when he delivered the parcel. Gave no notice of the contents, and nothing passed except the delivery of the parcel and the signing of the book. [*576

“Re-examination. The direction was, ‘J. H. Lutiger, Great St. Helen's, Bishopsgate Street, London.’

“James H. Lutiger. I am agent for the Swiss Watch Manufactory, and live in London. I received a letter from the plaintiff, stating he had forwarded a parcel to me by the Great Western Railway; and I have the letter. I never received that parcel. I went to the Great Western Railway station at Paddington, and saw an entry of the parcel having been received in Gloucester; but I was told it was not received in London.

“Cross-examined. I saw the clerk at the parcel-office. I did not see the chief inspector of police. I do not know of a robbery having been advertised in the papers. They promised to make every inquiry.

“Re-examined. They promised to inquire where it had been left, or if lost. I received the letter from Rimell on the 19th, and inquired at the station about two days afterwards.

“George Rimell, plaintiff. I am a silversmith. I received from Lutiger between the 11th and 16th of January, 1855, a quantity of goods, in value about 120*l.* I selected about 80*l.* worth, and returned the rest to him. They were packed in a small box, with partitions for each watch. The value of them was 39*l.* 9*s.* The value of the box is about 1*s.* 3*d.*

“Mr. Carter here applied to introduce the box into the particulars. Mr. Helps objected. The judge ruled against it, as justice did not re-

quire him to substitute that which the parties did not come there to try, to save a verdict. He would not amend.

"Examination continued. I wrote the same day to Lutiger, and *577] received a letter from him, that he had not *received the parcel. I addressed the parcel myself with the full address.

"Cross-examined. I made up the parcel myself. I either addressed it or stood by when it was addressed. I cannot say whether I was in the shop when my brother went with the parcel. I know he took it to the railway. Several days after the parcel was lost, I went to Mr. Ashbee at the station. I sent to the station as soon as I heard the parcel was not received; and, some time after, Mr. Collard, the chief inspector of police, and Mr. Giles, the local inspector, called at my house, and represented that the company were very anxious to find out if they had been robbed. I do not dispute that the company issued handbills about it. When I was asked, I gave Mr. Collard the particulars of the watches; and this is an exact copy now produced. I wrote letters to them afterwards; and Mr. Collard said he had found a watch with my name on, but it turned out it was not one of the watches lost. I have no doubt I told them the way-bill was wrong. I called at the Great Western station a few days after the parcel was lost, and went into Mr. Ashbee's private office; and, while there, Mr. Helps came in, and Ashbee said, 'Here's Mr. Rimell has lost a valuable parcel;' and it was asked what it was. Mr. Helps asked if it was insured: and Ashbee said 'No.' They then walked to the end of the office from me; and Mr. Ashbee said to Mr. Helps something to this effect,—'The worst of it is, something is wrong as to the way-bill.' That caused me to make further inquiry, which resulted in this action being brought. I also gave some particulars on the 7th of March to Mr. Potter, one of the directors of the company, to the effect that something was wrong in the way-bill. [A letter written to Mr. Potter was read.] I made inquiries before I wrote to Mr. Potter. [A letter was produced by *578] Mr. Helps for the witness to read, dated the 8th of *October, directed to Mr. Ashbee, wherein it was stated that the witness was in a position to prove beyond doubt that the parcel was stolen by one of the company's servants.] I have not yet had the chance of proving it. I believe it now, unless I am mistaken, on the production of the books. As far as my own judgment goes, I believe the parcel was not lost, but stolen. The charge for the parcel to London was 9d. I think the parcel was sent down after tea.

"John Ashbee, superintendent, produced the parcel-book and way-bill for the night mail train of the 18th of January, 1855. The first entry in the way-bill relates to this parcel. The office porter takes the parcels out on a barrow, and delivers them to a guard, and calls them over to see if they are all correct, and, if so, checks them with the way-bill. The guard's book and the way-bill will correspond, if correct.

The parcels are checked in London with the way-bill. A memorandum book is supplied by the company to the guard. The way-bills are not made out in the same way now: the addresses are added, and there has been an alteration since; the small parcels are locked in a bag: the guard has no key. I dare say that is in consequence of repeated losses. I never heard on this occasion, instead of eleven parcels going up, there were twelve. I heard of a parcel coming very late that evening. I cannot say whether that was omitted from the guard's book. [A leaf from the guard's book produced.] The number received on the bill at Gloucester, was, eleven, and, on the guard's book, only ten.

"Cross-examined. On receiving information of the parcel being missing, we instantly made every inquiry. The parcel-book produced, and corresponded with the way-bill, and eleven parcels found to be going that night to London. I made inquiries about the eleventh parcel, and found it came in late, after the guard had received *his [*579 parcels, was entered on the way-bill and in the parcels-book, and was duly delivered in London. I know Price, the guard. I never knew him to lose a parcel. No suspicion attached to him. He is now in the company's employ. Bossom has been in the company's employ three years, and is so still. No suspicion attached to him. Every exertion was made to recover the parcel, and every information searched for in every direction. There is a notice stuck up in the parcels office, under the 11 G. 4 & 1 W. 4, c. 68. [Notice produced.] Had the parcel been insured, it would have been specially taken care of; but, brought as an ordinary parcel, it would be chucked down in the London corner.

a. "Re-examined. The parcels are thrown down. They are not left to take care of themselves. There is always some one in the office, unless the door is locked: the clerk or porter going out locks the door. These are the instructions. They ought not to leave the office without locking the door: they would not do so. The name Lutiger on the way-bill and the parcel-book appear in different handwritings. There are two guards by the mail-train. They lock the parcels in the train in which they ride,—in the adjoining compartment. One guard, the chief guard, has charge of the parcels, and receives and delivers them at the different stations, as he goes along the line.

"Thomas Bossom. In the employ of the railway company. I remember receiving the parcel from the plaintiff; and I signed a receipt. I made the entry in the parcel-book. I remember receiving a parcel from Mr. Smallridge's clerk very late in the evening, addressed to 'Blaxland.' I at first objected to forward it; but I did so, and fetched the way-bill from the guard's box, and entered it and put it in the compartment of the carriage with the other parcels. The guard was not there at that time. By the box, I mean a box in the passengers' *department of the carriage. I did not see the guard. I [*580

had no opportunity of telling him of the parcel. He might be going to the Cheltenham train, to see after the parcels from Cheltenham.

"Cross-examined. I have received parcels for some years. Smallridge's parcel was the last entered on the way-bill that came to me after I had delivered to the guard the ten parcels. The word 'Lutiger' on the way-bill, and in the parcels-book, is in my handwriting. I delivered ten parcels to Price, and we went over them together, and they agreed as stated on the way-bill. If I had been told the parcel was of great value, the guard could have taken it with him in his pocket, or in the box he rides in.

"Re-examined. The guard could put a small parcel in his jacket pocket. The insured and uninsured parcels do not go in the same box. The insured parcels go in the same box with the guard, and the others in the next box. I believe other valuable parcels have been lost. When Mr. Smallridge's parcel arrived, the way-bill was in the guard's box. I unlocked the box, and took out the way-bill. I took it to the office. There I entered the parcel. Nobody was near the box when this took place. No guard or other person. There is the same lock to one box as to another. Other persons have keys that open the box. Other persons might have unlocked the box as well as me. I am quite sure I locked the box when I took away the way-bill. At that time, a house was kept by one Dale,—the Wellington. If one guard went there, the other would remain at the platform. It is now lately the practice to put on the way-bill the full address on the parcel. I believe that is in consequence of the loss of parcels.

"To the judge. There are other persons who have access to the carriages. A good many workmen in the company's service, who repair *581] carriages, have keys which *open the parcel-box; and passengers also have keys,—that is, keys of the boots of dog-carts are similar; and I have seen passengers open the carriages. On the night the parcel was lost, there were three porters on the platform who had such keys, and the two guards; and that would be the case all along the line. Where the guard keeps his parcels is like a passengers' box; but passengers do not ride in it.

"George Blamford proved seeing Bossom take Smallridge's parcel to the train. Could not see if either of the guards was present.

"This closed the plaintiff's case: whereupon Mr. Helps, for the defendants, applied to the judge for a nonsuit. Mr. Helps cited the cases of *Hinton v. Dibbin*, 2 Q. B. 663 (E. C. L. R. vol. 42), *Baxendale v. Hart*, 16 Jurist, 127, and *Butt v. The Great Western Railway Company*, 11 C. B. 140 (E. C. L. R. vol. 73); and contended, that, the parcel not being declared, it was not a question of negligence, and it was clear law, that even gross negligence would not make the defendants liable; and, in order to make the defendants liable on a felonious act of their servants, the onus to prove an act of felony rested with the

plaintiff; that there was no evidence beyond the receipt of the parcel, and its non-arrival,—no proof of any felony having been committed by any one; still less by any one of the defendants' servants.

"The judge declined to nonsuit, considering there was some evidence to go to the jury of the loss being occasioned by the felony of some of the company's servants, and negligence on the part of the company.

"The defendants then called the following witnesses:—

"Joseph Collard. Chief inspector of police of the Great Western Railway. In consequence of the loss of the parcel, I took every possible means to trace it. I searched the houses of all the porters at Gloucester and *Swindon who were on duty that night. No [582 suspicion rested on any one of the company's servants in consequence of the investigation. I had no reason to suspect any one. I applied to the guard, and took a leaf from his book. There were losses at the same time from Swindon and other places.

"Edward Gayler. Inspector at Gloucester. I assisted Mr. Collard at Gloucester in making inquiries and searching houses. No suspicion attached to any of the railway servants.

"John Price. Was guard on the evening of the 18th of January, 1855. I remember having received ten parcels from Bossum; the parcel for Lutiger was not one of them. After the train had started, I found eleven parcels entered on the way-bill; but I only received ten; which I reported at Paddington. The way-bill shows eleven parcels. I reported at Paddington I was one short. I have never lost a parcel before nor since. I have carried hundreds of thousands of parcels. I have been a parcel guard from two months after my employment. I put it along with the ordinary parcels. I did not go off the platform that night at Gloucester.

"Cross-examined. I received ten parcels. I never found out there were eleven parcels in. I knew nothing of the eleventh parcel being put in. There were eleven parcels in the way-bill; and I never made out the eleventh. I have had no orders about parcels lately.

"Re-examined. Bossum brought me the barrow with the parcels and the bill, and I counted ten parcels. As soon as the train was in motion, I saw the bill had been moved, and I took it up, and saw an eleventh parcel had been entered. I noticed in my book ten parcels received, and the eleventh in the bill. I could not then count the parcels, because they were in the next box.

"To the judge. I did not count the parcels till I got to London. I remember I had only received ten parcels. *I have no recollec- [583 tion of this particular parcel. When we receive the parcels, we only count them.

"Thomas Graham, superintendent of the western district of the Great Western Railway, resident at Bristol. I put Collard and the other parties in motion immediately on hearing of the loss. The result

of the investigation did not throw any suspicion on either of the company's servants.

"The judge, in summing up, told the jury, that, to entitle the plaintiff to a verdict, they must be satisfied of both of two facts,—first, that a felony had been committed with the parcel in question by some one of the company's servants,—and, secondly, that such felony was caused or facilitated by the negligence of the company or their servants: and that, if they were satisfied that the parcel had been stolen by some one of the company's servants, but were not of opinion that such felony was occasioned or facilitated by the negligence of the company, or, if they were of opinion that the parcel had been lost by the negligence of the company, but were not satisfied that a felony had been committed by some one of the company's servants,—in either case the defendants were entitled to their verdict."

The jury gave their verdict for the plaintiff for the full amount claimed.

The defendants appealed, on the ground that there was no case for the jury, on the plaintiff's evidence, of the parcel in question having been stolen by the defendants' servants, or of the said loss by theft having been facilitated by the defendants' negligence; and that the plaintiff should have been nonsuited at the close of his case, as insisted on by the defendants.

Phipson, for the appellants, was stopped by [JERVIS, C. J., who asked where was the evidence that any felony had been committed.]

*584] *Powell*, for the respondent.—This is not a case in which the defendants ought to have been allowed to appeal. They asked the judge to nonsuit the plaintiff at the trial; and, on his declining to do so, they called witnesses, and took the chance of a verdict. [JERVIS, C. J.—The complaint is, that the judge left the case to the jury, without any evidence to warrant him in so doing.] The parcel having been shown to have reached the company's hands at Gloucester, and there having been no misdelivery of it at any intermediate station, the irresistible conclusion is that it was stolen. [CRESSWELL, J.—What evidence was there to justify the judge or the jury in assuming that there had been no misdelivery of the parcel at any intermediate station?] If there had been any such misdelivery, the company might have shown it. The *prima facie* case made out on the part of the plaintiff was sufficient to call upon them to do so. That the parcel was placed in the parcel box by Bossom, the porter, is clear,—though it must be conceded that there is no ground for charging him with having stolen it. Then, there was at all events *some* evidence that the parcel could not have been stolen by a stranger. None but the servants of the company had access to the box in which it was placed: and the presumption is that the box was opened in the ordinary way by means of a key.

JERVIS, C. J.—I am of opinion that the judge of the county court erred in two respects. He tells them, that, to entitle the plaintiff to a verdict, they must be satisfied of both of two facts,—that a felony had been committed with the parcel in question by some one of the company's servants,—and that such felony was caused or facilitated by the negligence of the company or their servants: and that, if they were satisfied that the parcel had been stolen by some one of the company's servants, *but were not of opinion that such felony was occasioned or [585 facilitated by the negligence of the company, or, if they were of opinion that the parcel had been lost by the negligence of the company, but were not satisfied that a felony had been committed by some one of the company's servants,—in either case the defendants were entitled to their verdict. I think the judge was wrong in leaving the first question to the jury, because there was in my opinion no evidence whatever for them that any felony had been committed by any one of the company's servants. In truth, unless the courts in cases of this sort take upon themselves the duty of deciding, the statute which was intended for the protection of the carrier, will become a dead letter: for, juries always will find felony as against a company. I think it is the duty of the presiding judge to withdraw the question altogether from the jury, and not to allow them an opportunity of finding in favour of the plaintiff in defiance of all evidence. I therefore think the judge of the county court in this case was wrong in leaving it to the jury at all, and that he ought at once to have directed a nonsuit. Further, I think the judge has altogether misconceived the decision of this court in the case of *Butt v. The Great Western Railway Company*, 11 C. B. 140 (E. C. L. R. vol. 73), because, when the defendants set up a defence under the statute, negligence has nothing to do with the question. The rule is this,—under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and, on the other hand, under the carriers notice, negligence is the sole question, felony is immaterial. Under the statute, felony is an answer; under the notice, negligence. That is the effect of *Butt v. The Great Western Railway Company*, which was a case of felony permitted or occasioned by the negligence of *the defendants. I [586 think therefore the appeal must be allowed.

CRESSWELL, J.—I am of the same opinion. The statute gives protection to the carrier, unless the loss has occurred by means of felony on the part of the carrier's servants. But there must be reasonable evidence to satisfy the mind of the court and jury that the parcel was so lost. Mr. *Powell* has urged that the porter *Bossom* was mainly instrumental in putting the parcel in question into the box of the luggage van: but he very properly admits that there is no reason for thinking that it was stolen by him. There is not a scintilla of evidence of a loss by the felony of any one.

WILLIAMS, J.—I entirely concur with the Lord Chief Justice. The whole value of the statute will be destroyed by the courts of law, if evidence like this is to be allowed to go to the jury as establishing a case of felony.

WILLES, J.—I am of the same opinion. This is a gross abuse of the rule as to circumstantial evidence. There was no evidence whatever of felony by any servant of the company. I am glad the Lord Chief Justice has explained the case of *Butt v. The Great Western Railway Company*; for, in the modern text-books,^(a) it is cited as a case upon the statute, which in truth it has nothing whatever to do with.

Judgment of nonsuit.

(a) See Chitty and Temple on the Law of Carriers, pp. 55, 139.

*587] *HARMAN v. REEVE. May 31.

The 17th section of the Statute of Frauds, 29 C. 2, c. 3, and the 7th section of Lord Tenterden's Act, 9 G. 4, c. 14, are to be read together.

A contract for the sale of goods of the value of 10*l.* or upwards, is not the less within the 17th section of the Statute of Frauds because it also embraces something to which the statute does not extend.

Therefore, where it was agreed by parol, between A. and B., that A. should sell B. a mare and foal, and should at his own expense keep them until a certain day, and that A. should also for a given time keep and feed a mare and foal belonging to B., and that in consideration of all this, B. should fetch away A.'s mare and foal on the day named, and pay him 30*l.*:—Held, that this, so far as it related to the sale of A.'s mare and foal, was a contract within the 17th section of the Statute of Frauds, and void for want of writing,—no point having been made at the trial as to the value.

THE declaration stated, that, on the 28th of June, 1855, in consideration that the plaintiff bargained with the defendant to sell, and then sold to him, a certain mare and foal, and that the plaintiff would, at his own expense, keep and feed the said mare and foal for a certain time, to wit, until Michaelmas then next ensuing, and that the plaintiff would, at his own expense, maintain, feed, and keep a certain other mare and foal, *belonging to the defendant*, for and during the period of six weeks, *the defendant agreed to purchase from the plaintiff the mare and foal first mentioned, and to fetch the same away from the plaintiff's at Michaelmas aforesaid, and pay to the plaintiff the sum of 30*l.** The declaration then contained a general averment of performance by the plaintiff, and that all things had happened to entitle the plaintiff to have the contract performed on the defendant's part; and assigned for breach, that the defendant did not nor would fetch away the mare and foal so agreed to be purchased and fetched away, or either of them, or pay the plaintiff the said sum of 30*l.*,—concluding with an averment of special damage.

The cause was tried before Jervis, C. J., at the last Spring Assizes

for Norfolk. The plaintiff having proved the agreement as alleged in the declaration, and its performance on his part, and breach on the part of the defendant, it was objected, on the part of the latter, that *there was no note of the contract in writing, as required by the 17th section of the statute of frauds. For the plaintiff it was [*588 insisted, that the case was not within the statute at all, inasmuch as the contract was not for the sale of goods only, but for that and something more; and that, at all events, the case was taken out of the statute by reason of the part performance, viz. the reception of the grass eaten by the defendant's mare and foal.

His Lordship ruled that the contract was within the 17th section, and accordingly nonsuited the plaintiff, reserving him leave to move to enter a verdict for 30*l.*, if the court should think his ruling wrong.

O'Malley, in Easter Term, obtained a rule nisi for that purpose.

Byles, Serjt., now showed cause.—The nonsuit was right. This was a contract for the sale by the plaintiff to the defendant of a mare and foal, which the plaintiff was to keep for the defendant until the ensuing Michaelmas,—the contract having been made on the 28th of June. It was part of the contract that the plaintiff should also keep for the defendant another mare and foal (the property of the defendant) for six weeks. And for the whole of this the defendant agreed to pay the plaintiff 30*l.* So far as regards the *sale* of the mare and foal, that clearly is within the statute of frauds. [CROWDER, J.—There was no specific sum fixed as the price of the mare and foal?] No. The 30*l.* was the consideration for the whole. [JERVIS, C. J.—No point was made at the trial as to the value.] The 17th section of the 29 Car. 2, c. 3, enacts that “no contract for the sale of any goods, wares, and merchandises for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of *the goods so* [*589 *sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto, lawfully authorized.” The agistment of the defendant's mare and foal was not within the statute. But a contract may be within the statute, though the statute does not apply to the *whole* of it: *Mayfield v. Wadsley*, 3 B. & C. 357 (E. C. L. R. vol. 10), 5 D. & R. 224 (E. C. L. R. vol. 16); *Mechelen v. Wallace*, 7 Ad. & E. 49 (E. C. L. R. vol. 34), 2 N. & P. 224. It may be sought to take the case out of the statute by suggesting that the allowing the mare and foal to remain in the possession of the vendor, made him liable to the vendee, and so there was a sufficient delivery and acceptance. That was first attempted in the case of *Tempest v. Fitzgerald*, 3 B. & Ald. 680 (E. C. L. R. vol. 5). There, A. agreed to purchase a horse of B. for ready money, and to take him within a time agreed upon. About the expiration of that time, A. rode

the horse, and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price: to this B. assented. The horse having died before A. paid the price or took it away,—it was held that there was no acceptance of the horse within the meaning of the statute of frauds. Holroyd, J., there says: "The object of the statute of frauds was, to remove all doubts as to the completion of the bargain, and it therefore requires some clear and unequivocal acts to be done in order to show that the thing had ceased to be in fieri. Those acts are, either that the buyer shall accept part of the goods sold, and receive the same, or give something in earnest or in part payment, or that the contract be reduced to writing. These are all acts that clearly and unequivocally show that the bargain is executed.

*590] It is said that the riding of the horse by the *defendant on the 20th of September, and the directions then given, may be considered as acts of ownership, and were, therefore, evidence of an acceptance of the horse; but, at that time, the defendant had no right to take away the horse; for, admitting, for the sake of the argument, that the property had been changed, still there is no evidence to show that Tempest had ever parted with the possession or control, and, if he had not, he had at all events a lien for the price, and the defendant could not be justified in taking it away until the price were paid."

[WILLES, J.—The riding of the horse by the buyer took place before the day for the completion of the bargain.] The ground of the decision was, that there can be no delivery or acceptance, unless the vendor's lien for the price is gone. *Acceptance* alone will not do; there must be a complete *delivery*. *Holmes v. Hoskins*, 9 Exch. 753,† as to this point, is exactly like the present case. There, the defendant verbally agreed to purchase of the plaintiff some cattle then in his field: after the bargain was concluded, the defendant felt in his pocket for his check-book, in order to pay for the cattle, but, finding he had not got it, he told the plaintiff to come to his house in the evening for the money: it was agreed that the cattle should remain in the plaintiff's field for a few days, and *that the defendant should feed them with the plaintiff's hay*, which was accordingly done: and it was held that there was no evidence of an acceptance of the cattle to satisfy the statute of frauds. Parke, B., there says: "In order to satisfy the statute, there must be an acceptance, and an actual or constructive delivery. Now, in this case, there was no actual delivery; and therefore, to entitle the plaintiff to recover, there must be such a dealing with the cattle by the defendant *as owner*, that the plaintiff would lose his lien. But it is clear that the plaintiff never meant to part with the cattle until the price was paid; and there is no ground for

*591] *holding that the mere giving permission to feed the cattle changed the possession. In the case of *Tempest v. Fitzgerald*, 8 B. & Ald. 680 (E. C. L. R. vol. 5), the jury found that the defendant,

by riding the horse, and giving directions respecting its future treatment, exercised an act of ownership over it; but the court held that there was no acceptance, since, by the terms of the contract, the defendant had no right of property in the horse until the price was paid, and therefore he could not exercise any right of ownership." So, in *Bill v. Bament*, 9 M. & W. 36, 41,† Parke, B., says,—“To take the case out of the 17th section, there must be both *delivery* and *acceptance*; and the question is whether they have been proved in the present case. I think they have not. I agree that there was evidence for the jury of acceptance, or, rather, of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them: so also the receipt was some evidence of an acceptance. But there must also be a *delivery*; and, to constitute that, the possession must have been parted with by the owner, *so as to deprive him of the right of lien*.” In the present case, there clearly was no delivery; the delivery and the payment of the price were to be simultaneous acts, and were mutually conditions precedent. The true test is that put by Parke, B.,—was there a delivery, vesting the property and the right of possession in the vendee, free from any claim of lien on the part of the vendor? That is the only sort of delivery the statute of frauds recognises. [WILLIAMS, J.—The feeding was not part of the original bargain in *Holmes v. Hoskins*.] No: it was a term added afterwards, which makes the case all the stronger in favour of the present argument. The agistment of the defendant's mare and foal was no part of the *thing sold*. There was not even a valid contract for the eatage of the grass: and, if there had been, *there was no single blade of grass sold or delivered. There is no difference in this [*592 respect between the 4th and the 17th sections.

O'Malley and Couch, in support of the rule.—The court will not be astute to defeat the real justice of the case. The contract was this: the defendant agrees to buy of the plaintiff a mare and foal, which were to be kept by the plaintiff until a given day; and the plaintiff was further to keep a mare and foal belonging to the defendant for six weeks: and for the whole of this the defendant was to pay the plaintiff 30*l*. There is nothing on the face of the contract to show the price agreed on for the one or the other part of the contract; and the 17th section of the statute of frauds does not apply unless the contract on the face of it relates to goods of the price of 10*l*. or upwards. The cases relied on for the defendant were decided on the 4th section, between which and the 17th there is a manifest distinction. The 4th section enacts that “no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person there-

unto by him lawfully authorized." There is no limit of price or anything else: it is an absolute prohibition. If a contract be for the sale of an interest in or concerning lands of the value of 1s. and of goods of the value of 100l., the prohibition of s. 4 is absolute. This contract, however, clearly is not within the statute. [WILLIAMS, J.—It is difficult to say, that, upon the face of this contract, the mare and foal were sold at the *price* of 10l. If they were sold at the price of 10l., it seems to me to be impossible to escape from the words of the statute. [JERVIS, *593] *C. J.—The delivery was to take place at a future day; and then the 7th section of Lord Tenterden's Act, 9 G. 4, c. 14, substitutes *value* for *price*.] No suggestion of that sort was made at the trial. [JERVIS, C. J.—It is enough that it suggests itself now. Suppose the foal which the plaintiff agreed to sell died before Michaelmas, whose would have been the loss?] The defendant's, clearly. [JERVIS, C. J.—Clearly not.] At all events, there has been a sufficient delivery and acceptance,—an acceptance of a portion of the matter contracted for, so as to take the case out of the statute. The case is not strictly within the words of the statute at all: they apply more properly to a sale of goods only, unaccompanied by anything else. If the first part of s. 17 is extended to something besides goods, the same construction must be given to the same words in the second part. Here, the defendant has had the benefit of the six weeks' agistment of his mare and foal. [JERVIS, C. J.—Could not the plaintiff sue him for that, upon the principle suggested by Bayley, B., in *Wood v. Benson*, 2 C. & J. 94?†(a) WILLIAMS, J.—Bayley, B., suggests the same thing in *The Earl of Falmouth v. Thomas*, 1 C. & M. 89, 101.† *Byles*, Serjt., observed that the particulars confined the claim to the plaintiff's mare and foal.] In *Scott v. The Eastern Counties Railway Company*, 12 M. & W. 33,† it was held, that, where an order is given for goods, some of which are ready-made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready-made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole to satisfy the provisions of the statute of frauds, *29 Car. 2, c. 3, s. 17, and the 9 G. 4, c. 14, s. 7, as *594] the whole forms one entire contract. Alderson, B., there observes,—"If I make a contract for goods already made, and goods to be made, and I accept the goods made, it shows that I made the contract; which is what the act means."†(b) [Byles, Serjt.—Lord Abinger's judgment in that case is important, as showing that the two statutes are to be read together. He says: "The two statutes that have been referred to must be construed as incorporated together; and then it is plain,

(a) "It by no means follows, that, because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good."

(b) See *Elliott v. Thomas*, 3 M. & W. 170.†

that, where an order for goods made, and for others to be made, forms one entire contract, acceptance of the former goods will take the case out of the statute as regards the latter also." It is by no means clear that this contract is within the 17th section at all; and the court will not be disposed to enlarge the construction of its language, especially as the propriety of repealing it altogether is now under the consideration of the legislature. The cases upon the 4th section cited on the other side, do not bear out the construction contended for. *Mayfield v. Wadsley*, 3 B. & C. 357 (E. C. L. R. vol. 10), 5 D. & R. 224 (E. C. L. R. vol. 16), does not touch this question: and in *Mechelen v. Wallace*, 7 Ad. & E. 49 (E. C. L. R. vol. 34), 2 N. & P. 224, there was no hiring of the furniture apart from the house: the hiring was of the house, the furniture being merely accessory. A contract for agistment is not a contract for an interest in land: *Jones v. Flint*, 10 A. & E. 753 (E. C. L. R. vol. 37), 2 P. & D. 594. The land where the mare and foal were agisted was in the possession of the plaintiff: besides, there was no agreement that they should be agisted on any particular spot. The distinction between *Tempest v. Fitzgerald* and *Holmes v. Hoskins* and the present case, is, that here the keep of the mare and foal formed part, and a material part, of the contract.

*JERVIS, C. J.—I am of opinion that this rule should be discharged. It is now well settled that the 17th section of the statute of frauds, 29 Car. 2, c. 3, and the 7th section of Lord Tenterden's act, 9 G. 4, c. 14, are to be read together. Now, the last-mentioned enactment provides that the 17th section of the former act shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, &c. The effect of that enactment, therefore, is, to substitute "value" for "price" in the former statute, and to adopt an uniform rule in all cases. The 17th section of the statute of frauds must consequently now be read thus,—"No contract for the sale of any goods, wares, and merchandises, of the value of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." This is the case of a contract for the sale of goods above the value of 10*l.*; for, we are entitled to look de*hors* the contract for the purpose of ascertaining the value. It is not the less a contract for the sale of goods of the value of 10*l.* or upwards, because it is also a contract for something more, viz. the eatage of the plaintiff's mare and foal until Michaelmas, and of the defendant's mare and foal for a period of six weeks; and there is no memorandum in writing. *Primâ facie*, therefore, the case is within the statute, the principal subject-matter of

the contract being the sale of the mare and foal by the plaintiff to the defendant, and the rest being ancillary only. I therefore think, that this being a contract partly for the sale of goods of the value of 10*l.* and *596] upwards, it *falls within the statute, and cannot be enforced as a contract. Then, has there been an acceptance to take the case out of the statute? I think not: there has been no acceptance by the defendant of the plaintiff's mare and foal. And there is no injustice in this; for, the plaintiff may still recover for the price of the agistment of the defendant's mare and foal. Mr. *Couch*, indeed, suggests that the plaintiff would probably not have agisted the defendant's mare and foal, or would not have agisted them at the price, but for the agreement on the defendant's part to buy his mare and foal, and therefore that this is not the fair result. But that is a sort of thing that occurs daily. I agree to let a man a house on lease for ten years: he enters and occupies for a year, when I sue him for use and occupation. What answer would it be for him to say,—“I would not have entered into possession at all, but for the agreement to grant me a lease?” Although he has by his own laches failed to get all he bargained for, he must, nevertheless, pay for what he has had. I think the suggestion thrown out by Bayley, B., in some of the cases,—that, where the contract cannot be enforced because in part a contract for the sale of goods of the value of 10*l.* or upwards, and not in writing, the plaintiff may still recover on a quantum meruit for that part which is not within the statute,—gives the true solution.

WILLIAMS, J.—I am of the same opinion. It is admitted that this is a contract for the sale of goods of the value of 10*l.* or upwards. The contract, under which the defendant was to pay the plaintiff 30*l.*, besides the sale of goods, included something which perhaps was not within the statute of frauds. But, the price being indivisible, the contract is indivisible also, and therefore it is declared on as an entire contract, and does *597] not come within the cases of divisible contracts contemplated *by Bayley, B., in the cases alluded to. The unity of price makes it an entire contract. That being so, the cases referred to as to the 4th section are conclusive in this respect as to the construction of the 17th section: and this contract, being entire, cannot be enforced, because it is a contract for the sale of goods of the value of 10*l.* or upwards, and is not brought within any of the exceptions in the statute. It is clear there was no earnest, no part payment, and no memorandum in writing; and the only question is, whether there has been an acceptance or receipt of part of the goods so sold, so as to bring the case within the remaining branch of the exception. It seems to me to be utterly impossible by any latitude of construction to say that the buyer has accepted part of the good so sold; and therefore I think the contract must be disallowed altogether. I agree, however, with my Lord Chief Justice in thinking, that, although the plaintiff is not in a condition to

enforce *this* contract, he may still enforce the contract which the law will imply from the defendant's enjoyment of that part of it to which the statute of frauds does not apply.

CROWDER, J.—I am of the same opinion. The first question is whether this is a contract within the statute of frauds. It is one entire contract for 30*l.* as the price of a mare and foal and the agistment of those and of another mare and foal. It was said, that, as there was no fixed price of 10*l.* or upwards for the mare and foal, the case was not within the statute. But, reading, as we are bound to do, the 7th section of the 9 G. 4, c. 14, with the 17th section of the statute of frauds, the question is whether this is not a contract for the sale of goods of the *value* of 10*l.* or upwards. It was admitted upon the argument, indeed it could not be disputed, that the sale of the mare and foal was the principal subject-matter *of the agreement; and the only question is, whether [*598 the addition of the other matter took it out of the statute. It appears to me that the contract clearly comes within the words of the statute. It is an entire contract, and one which cannot be sued upon, unless it is in writing or within one of the other exceptions in s. 17. Being a contract within the statute, the next question is, whether there has been any acceptance of the goods so sold. The goods so sold in this case, were, the mare and foal, not the agistment: it is impossible, therefore, to say that there has been any acceptance of any part of the goods so sold within the meaning of the statute. For these reasons, I concur with the rest of the court in thinking that the rule to enter the verdict for the plaintiff should be discharged.

WILLES, J., had gone to chambers before the argument was concluded. Rule discharged.

*LEE v. BAYES and ROBINSON. May 26. [*599

A sale by public auction at a horse repository out of the city of London, is not a sale in market overt.

To entitle the owner of stolen property to maintain an action for converting it against a third person, in whose possession he finds it, it is not necessary that he should first have prosecuted the felon.

A. having *bonâ fide* purchased a stolen horse at a public auction (not being market overt), sent it for sale to a repository for horses kept by B. The owner of the horse finding it there, demanded it of B. in the presence of A., when B. refused to deliver it up to him:—Held, evidence of a joint conversion.

THE first count of the declaration charged that the defendants converted to their own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods, that is to say, a horse; and the second, that the defendants detained from the plaintiff his goods, to wit, a horse: and the plaintiff claimed 100*l.* in respect of the first count, and, in respect of the second count, a return of the goods in the same count mentioned, or their value and 20*l.* for their detention.

The defendants severed in pleading; Bayes pleading,—first, not guilty,—secondly, that he did what was complained of by the plaintiff's leave,—thirdly, that the goods in the declaration mentioned were not, nor was either of them, the goods of the plaintiff, as alleged; and Robinson,—first, not guilty,—secondly, that he did what was complained of by the plaintiff's leave,—thirdly, that the said horse in the first count of the declaration mentioned, and the said horse in the second count of the declaration mentioned, were not, nor was either of them, at the time of the commencement of this suit, the goods of the plaintiff, as alleged. Issue thereon.

The cause was tried before Willes, J., at the second sitting in Middlesex in Hilary Term last, when the following facts appeared in evidence:—

The horse in question, which belonged to the plaintiff, had been stolen from the marshes in Essex where it had been turned out. The defendant Bayes, who was a horse-breaker, and had been commissioned to buy a horse for a customer, attended a public auction on the 27th of November last, at Rea's horse repository in St. *George's *600] Fields, Southwark, and, through the agency of a man named Proctor, bought the horse for 8*l.* 5*s.* His customer, however, not approving of the purchase, and declining to take the horse, Bayes sent it to another repository for the sale of horses, in Little Britain, kept by the defendant Robinson, to be sold. Whilst at Robinson's, the horse was seen and claimed by the plaintiff, who was informed by Robinson's clerk or foreman that it belonged to Bayes. Upon being applied to by the plaintiff, Bayes at once told him where he had bought the horse, but, as he refused to give it up, and Robinson's clerk, and Robinson himself, who was present, refused to restore the horse without Bayes's authority, the plaintiff obtained the assistance of a police-constable, and took Bayes to a police-station upon a charge of stealing the horse. The inspector on duty declined under the circumstances to take the charge, but sent a constable with the parties to Rea's repository, where they saw the auctioneer, who satisfied the plaintiff that the horse had been bought here. The plaintiff, Bayes, and the policeman then went back to Robinson's, when the plaintiff again demanded the horse of Bayes, of Robinson's son, and of his foreman, offering Robinson an indemnity; but they all three refused to give it up.

On the 7th of December, Robinson's attorney wrote to the plaintiff, offering to deliver up the horse, on being paid for its keep, and on an indemnity being given to Bayes and himself.

For the defendants, it was submitted, that, inasmuch as the horse was sold at a public auction, the plaintiff could not recover; that, at all events, he was bound first to prosecute the thief to conviction; and that there was no evidence of a *joint* conversion.

The learned judge declined to give effect to the objections, and left

the case to the jury, who (finding that *Bayes had purchased the horse bona fide) returned a verdict for the plaintiff, damages 30*l.*, [*601 to be reduced to 5*l.* on the horse being given up to the plaintiff; and leave was reserved to the defendants to move to enter a nonsuit or a verdict for them, if the court should be of opinion that either of the above objections was well founded.

Prentice, in Hilary Term last, on behalf of Robinson, moved for a rule nisi accordingly.—The horse having been stolen, no property in it of course could pass to the defendant unless he had purchased it in market overt. The first question, then, is, whether a sale at Rea's repository, which is in an open and public place for the sale of horses, is not a sale in market overt. The authorities do not very clearly define what is market overt. [JERVIS, C. J.—It is an open, public, and legally constituted market,^(a) which this is not.] This is a place to which any of the public may resort for the purpose of buying. [CRESSWELL, J.—So they may to any open shop; but that does not, except by custom in London, constitute a market overt.] The next question is, whether, to entitle him to maintain this action, the plaintiff was not bound to prove that he had prosecuted the thief to conviction. [JERVIS, C. J.—Certainly not.] In the notes to *Wilbraham v. Snow*, 2 Wms. Saund. 47 h, it is said that “it appears to have been held, that, where goods are stolen, the owner cannot bring trover for them against a vendee, even though they have not been sold in market overt, until he has done his duty in prosecuting the thief: *Gimson v. Woodfall*, coram Best, C. J., 2 C. & P. 41 (E. C. L. R. vol. 12).” And in *Peer v. Humphreys*, 2 Ad. & E. 495 (E. C. L. R. vol. 29), 4 N. & M. 430 (E. C. L. R. vol. 30), Littledale, J., says,—“The law is, that no action shall be brought, under particular circumstances, until the owner has done his duty by *prosecuting.” [CROWDER, J.—That is expressly overruled by *White v. Spettigue*, 13 M. & W. 603,† where it was held,—on the authority of *Stone v. Marsh*, 6 B. & C. 551 (E. C. L. R. vol. 13), 9 D. & R. 648 (E. C. L. R. vol. 22), R. & M. 364 (E. C. L. R. vol. 21), and *Marsh v. Keating*, 1 N. C. 198 (E. C. L. R. vol. 27), 1 Scott, 5,—that the obligation which the law imposes on a plaintiff to prosecute the party who has stolen his goods, does not apply where the action is against a third party innocent of the felony. JERVIS, C. J.—That was a very remarkable case. The place where the transaction occurred was within one door of the city of London. *Gimson v. Woodfall* and *Peer v. Humphreys* are overruled; and the present case will be a confirmation of *White v. Spettigue*.] Then, it is submitted, Robinson was guilty of no conversion. He received the horse in the course of his trade: it was not competent to him to dispute the title of his customer. Suppose the case of a servant holding his master's horse,—would he be guilty of a conversion for refusing at once to admit the title of a man whom he had no means of

(a) See Com. Dig. *Market*.

knowing to be the owner? [JERVIS, C. J.—In that case, the reason of the refusal to deliver up the horse is explained; and the refusal would be no evidence of conversion. In *Alexander v. Southey*, 5 B. & Ald. 247 (E. C. L. R. vol. 7), where the plaintiff's goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and, on his being applied to by the plaintiff to deliver them up to him, refused to do so without an order from the company,—it was held that this was not such a refusal as amounted to a conversion [WILLIAMS, J.—In *Greenway v. Fisher*, 1 C. & P. 190 (E. C. L. R. vol. 12), Lord Tenterden takes a distinction between the case of a servant and that of a carrier or packer, on the ground that the latter is exercising a public employment.] There was no evidence here of a joint *608] conversion by Robinson and *Bayes. [CRESSWELL, J.—Robinson, in the presence of Bayes, refuses to give up the horse, and Bayes adopts the refusal.]

JERVIS, C. J.—We think there should be a rule nisi to enter a verdict for the defendant Robinson, upon the last point only, viz. on the ground of the want of evidence of a conversion by him. Rea's repository clearly is not market overt, which means a regularly constituted market, like Smithfield, for instance. As to the necessity of a prior prosecution of the felon to conviction, the cases relied on for the defendants are clearly overruled by *White v. Spettigue*.

Joyce (with whom was *Byles*, Serjt.) now showed cause.—There was ample evidence of conversion by both defendants. Robinson himself on one occasion, and his son on another, expressly refused in Bayes's presence to give up the horse to the plaintiff without an indemnity. In *Hall v. White*, 3 C. & P. 136 (E. C. L. R. vol. 14), it was held, that, if a person who writes an answer to a demand made upon another person of certain things, says that *he* has got them, and thereby induces the claimant to bring an action against him, he is liable to such claimant in detinue, although it does not appear that he had the general controlling power over the things. [JERVIS, C. J.—That is rather a strong instance of the abominable standing-by doctrine.] The horse being detained by Robinson as the property and for the use of Bayes, and the latter adopting the act of the former, they clearly are guilty of a joint conversion: *Wilson v. Barker*, 4 B. & Ad. 614 (E. C. L. R. vol. 24). [JERVIS, C. J.—The real question is, whether the public character of Robinson excuses his non-delivery of the horse to the owner, on demand; and whether the letter of the 7th of December so alters the character of his *604] refusal as to make it evidence of a *participation by him in a joint conversion. *W. G. Harrison* (for the defendant Robinson) observed that that letter was written three days after the commencement of the action.] In *Wilson v. Anderton*, 1 B. & Ad. 450 (E. C. L. R. vol. 20), the captain of a ship, who had taken goods on freight,

and claimed to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, and he refused to deliver them without the directions of the bailor; and it was held, that, the bailor not having any lien upon the goods, the refusal of the bailee was sufficient evidence of a conversion. Lord Tenterden there says: "A bailee can never be in a better position than the bailor. If the bailor has no title, the bailee can have none; for, the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in the case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title." [JERVIS, C. J.—Suppose a man gives goods to a carrier to be carried for him, and the real owner comes and demands them: is the carrier's refusal to deliver them up necessarily a conversion?] Perhaps not, if he assigned a lawful reason for his refusal.

W. G. Harrison, in support of the rule.—There was no evidence of a conversion by Robinson. The case of *Green v. Dunn*, 3 Campb. 215, n., is very like the present. It was trover for timber which the defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier. The plaintiff, to whom the timber belonged, *having demanded it of the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else." And Lord Ellenborough said: "This is a qualified refusal, and no evidence of conversion." In 2 Wms. Saund. 47 k, n. (t), it is said,—"If A. finds the goods of B., and, upon a demand of the goods, answers that he knows not whether B. be the true owner, and therefore refuses to deliver them, this is not evidence of a conversion, if A. keep them for the true owner:" per Coke, C. J., *Isaac v. Clarke*, 2 Bulstr. 312; per Lord Ellenborough, *Green v. Dunn*, 3 Campb. 215, n.; per Lord Kenyon, *Solomon v. Dawes*, 1 Esp. N. P. C. 83. The defendant Robinson was entitled to some evidence that Lee was the true owner, before his merely saying that he held the horse for Bayes could make him guilty of a conversion. It was only on the re-examination of the plaintiff that the learned Serjeant succeeded in obtaining even that qualified assertion of Bayes's title. [JERVIS, C. J.—The refusal to give up the horse to the plaintiff was absolute and unqualified. At first, the refusal was qualified: but, on the second occasion, when the horse was demanded, both defendants being present, there was no reference to the owner, but an absolute refusal to give up the horse. WILLIAMS, J.—How do you distinguish *Wilson v. Anderton* from the present case? The defendant there absolutely refused to deliver up the goods upon the demand of the true owner, without the directions of the

party who had deposited them with him. It is very different from the case of *Alexander v. Southey*, 5 B. & Ald. 247 (E. C. L. R. vol. 7).] Anything that affords an excuse for not at once complying with the demand, deprives the refusal of its tortious character: *Verrall v. Robinson*, 2 C. M. & R. 495,† 5 Tyrwh. 1069, 4 Dowl. P. C. 242. In *Mires v. Solebay*, 2 Mod. 242, it was held that trover will not lie against a servant for an unlawful intermeddling with the goods of a third person *606] "by the command of his master, unless such intermeddling amount to a *trespass*. The court, in giving judgment, say: "The action will not lie against the servant; for, it being in obedience to his master's command, though he had no title, yet he shall be excused." "And this also," Mr. Justice Scroggs said, "would extend to all cases where the master's command was not to do an apparent wrong; for, if the master's case depends upon a title, be it true or not, it is enough to excuse the servant; for, otherwise it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's title and right before he obeys his commands; and it is very requisite that he should be satisfied, if an action should lie against him for what he doth in obedience to his master." [WILLIAMS, J.—It is impossible that that can be law now.] Here, there was no evidence of a joint possession, so as to make a refusal by one a conversion by both defendants: *Nicoll v. Glennie*, 1 M. & Selw. 588.

JERVIS, C. J.—I am of opinion that this rule must be discharged. The course of the argument assumes that no point was made at the trial upon the objection that Robinson the son had no authority in the general management of the business to bind his father, the defendant Robinson, so as to make a demand upon and refusal by him evidence of a conversion by the father. I assume that the point was not made; and it is upon that assumption that I come to the conclusion that the rule should be discharged. Mr. *Harrison* is, I think, mistaken in saying that it was only on the re-examination of the plaintiff that my Brother *Byles* succeeded in getting out evidence of an unqualified refusal on the part of Robinson to give up the horse. It appears that there were three parts of the transaction. On the first occasion, when the plaintiff saw the horse, and demanded it of the defendant Robinson and his *607] foreman, Robinson *referred him to Bayes. That was a mere qualified refusal. The plaintiff and Bayes then go to the police-station, and thence to Rea's repository, in Southwark, where it was ascertained that the horse which had belonged to the plaintiff had been *bonâ fide* bought by Bayes. The plaintiff, the defendant Bayes, and the policeman then go back together to Robinson's, where the plaintiff again demands the horse of Bayes, Robinson the son, and the foreman, offering an indemnity; but they all three refuse to give it up. That was the evidence given by Lee on his examination in chief; and he repeated it on re-examination. When the matter comes to be con-

sidered, there is, I think, no difficulty in the rule, or in the application of it, as suggested by Mr. *Harrison*. As between master and servant, or perhaps as between principal and agent, where the servant or agent receives from his master or his principal goods which belong to a third person, on their being demanded of him by such third person he is entitled to say, "I received them from my master or my principal; and I require a reasonable time to ascertain whether the party making the demand is the real owner;" and such qualified refusal would not be evidence of a conversion so as to render him liable in trover. But, if, as in this case, and in most of the cases cited, the man who holds the goods chooses to set up the title of his bailor, and to rely on it, he is doing an act which is foreign to his employment or his duty. He asserts a title adverse to the title of the real owner of the goods, and so is guilty of a conversion. That, I apprehend, is the fair result of the evidence in this case. When all the parties were together on the second occasion, and the plaintiff offered an indemnity, Robinson does not refer him to Bayes, and so qualify his refusal; but he takes upon himself to say "I will not give up the horse to you." That appears to me to answer the argument which has been urged on the *part of the defendant, and to show that the evidence does not raise the [*608 difficulty suggested. I think the rule should be discharged.

WILLIAMS, J.—I am of the same opinion. Some allusion has been made in the progress of the argument to the case of servants and agents employed in the course of trade: as to the position in which these persons stand with reference to the action of trover, there is a little confusion. A servant who does an act which in his master would amount to a conversion, may be liable in trover, though the act be done by him as servant and for the sole benefit of his master. But, with respect to a person employed in the course of trade, as a carrier or a packer, he will not be guilty of a conversion by merely following the ordinary course of his public employment. But, if a servant or a carrier or packer absolutely refuses to give up goods when demanded of him by the true owner, that refusal may be evidence against him of a conversion. The same evidence, however, which would prove a conversion by the master or the bailor, may not suffice to prove a conversion by the servant or agent, because it may be a mere qualified refusal. But, where the servant or agent absolutely and unqualifiedly repudiates the title of the owner, and relies upon that of his master or bailor, as in *Wilson v. Anderton*, 1 B. & Ad. 450 (E. C. L. R. vol. 20), his refusal to admit the title of the owner amounts to a conversion. That is the principle upon which that case of *Wilson v. Anderton* was decided, where evidence that the bailee refused to give up the goods without the direction of his bailor, was considered as evidence of a conversion, inasmuch as he elected to assert and to rely on the title of the bailor. Here, I think, upon the second occasion, there was quite sufficient

evidence to show that the defendant Robinson meant to rely on some
 *609] claim for the expense of the horse's keep whilst at his *reposit-
 tory, or that he refused to give it up because he relied on some
 other man's title. I therefore agree with the Lord Chief Justice
 in thinking that there was sufficient evidence in this case of a joint
 conversion to justify the verdict.

WILLES, J.—I am of the same opinion. The case of *Greenway v. Fisher*, 1 C. & P. 190 (E. C. L. R. vol. 12), decides that, if a person exercising a public employment be intrusted with goods to deal with them in the course of that employment, and does so deal with them, having at the time he receives them no notice that any third person has title, he is not liable in trover. There was also a case, the name of which I do not at this moment remember, where trover was brought against the South Eastern Railway Company for certain timber by the assignees of a bankrupt, and the Court of Exchequer expressed a strong opinion that the action would not lie, the timber having been handed over by the company pursuant to the directions of the bankrupt, before they had any notice of the title of the assignees. This, however, is a different case; for, here, the defendants had notice that the horse belonged to Lee; and although what passed on the first occasion when the horse was demanded was merely a reference to Bayes as the party who had deposited it as owner, on the second occasion there was an absolute and unqualified refusal to acknowledge Lee's title, and an assertion of the title of Bayes, which clearly was evidence of a conversion. The letter of the 7th of December, though written after the commencement of the action, may serve to throw light on the previous transaction.
 Rule discharged.

The weight of American authorities 1 Const. Rep. 231; *Piscataqua Bank v.*
 is in favour of the latest English doc- Turnley, 1 Miles, 312.
 trine, that the civil remedy is not sus- Contra, *Foster v. Tucker*, 3 Green-
 pended in case of a felony until the leaf, 458; *Boody v. Keating*, 4 Ibid.
 felon is prosecuted: *Pettingell v. Ride-* 164; *Morgan v. Rhodes*, 1 Stewart, 70;
 out, 6 N. Hamp. 454; *Boardman v.* Crowell v. Merrick, 1 Appleton, 392.
Gore, 15 Mass. 386; *Robinson v. Culp*,

*610] *LONG v. ORSI and Another. June 10.

An attorney received from O. & A., agents of C. L. & Co. of Paris, instructions to sue the acceptors upon five foreign bills of exchange which they (O. & A.) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all endorsed to C. L. & Co. The attorney thereupon brought the action in the names of O. & A., and discovering afterwards, when the bills were for the first time shown to him, that there was no special endorsement to O. & A. as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co.:—
 Held, that the suing in the names of O. & A. without having first ascertained that they were in a position to maintain an action on the bills, was such *gross negligence* as to disable the attorney from recovering the costs of the abortive action.

THIS was an action for work and labour done and performed by the plaintiff for the defendants at their request, and for divers attendances by the plaintiff for the defendants, and for fees and disbursements due and owing by the defendants to the plaintiff, and for money paid and expended and materials provided by the plaintiff for the defendants at their request, and for money found to be due from the defendants to the plaintiff on an account stated between them.

Pleas, never indebted, and payment. Issue thereon.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—

The plaintiff, an attorney carrying on business in London under the firm of Long & Long, in November, 1854, received from the defendants, Messrs. Orsi & Armani, who were foreign agents residing in London, instructions to commence an action for them upon certain foreign bills of exchange. These instructions were contained in a letter of which the following is a copy:—

“6, Guildhall Chambers,
“Basinghall Street, Nov. 23, 1854.

“Messrs. Long & Long.

“We beg to enclose you copy of five bills of exchange, of the same dates, tenor, and sums, viz. each 5000 francs, drawn on Messrs. Collingridge, Simpson & Co., of Paris, unpaid and duly protested in our hands, and will thank *you to take such proceedings as may be necessary to recover the amount of the same,—in all, 25,000 [*611 francs.

“We remain, &c.,

“ORSI & ARMANI.”

With these instructions, the defendants also sent the plaintiff a paper writing, a copy of which is as follows:—

“Javel, le 1^{er} Aout, 1854.

“B. P. 5000 fr.

“Au cinq Novembre prochain, payez par cette seule de change, à l'ordre de nous-mêmes, la somme de cinq mille francs, valeur en marchandises, que vous passerez suivant l'avis de F. S. de Sussex & C^{ie}.

“Collingridge, Simpson et C^{ie}.

“A Paris, Rue Lafitte, No. 29.

“Acceptée pour la somme de cinq mille francs,

“Collingridge, Simpson et C^{ie}.”

“The above is a copy of five bills of exchange, each precisely the same, making in all 25,000 francs; and they are all endorsed to Messrs. Cusin, Legendre & C^{ie}.”

The plaintiff never saw the bills themselves; but, acting on the above instructions, and concluding from the statement therein that the bills were “unpaid and duly protested in their hands,” that Orsi &

Armani had authority to sue thereon *as endorsees*, commenced an action in their names upon the bills, against Collingridge, Simpson & Co., Mr. Simpson, one of the firm, being at the time in London. That action having proceeded as far as plea, the defendants' attorney obtained an order for an inspection of the bills; and, accordingly, Mr. Long applied for and obtained them from Orsi & Armani, when he immediately discovered that there was no special endorsement to Orsi & *612] Armani, as is *required by the law of France (a) to entitle them to sue upon them, and, upon further inquiry, he found that the bills had been merely transmitted to Orsi & Armani by Messrs. Cusin, Legendre & Co., of Paris, for whom they acted as agents. The action was accordingly discontinued, and the defendants' costs paid; and another action was commenced against Collingridge, Simpson & Co., in the names of Cusin, Legendre & Co. The cause being ready for trial, and Mr. Long requiring Orsi & Armani either to furnish him with funds to carry it on or to give him an undertaking to pay his charges, they wrote him the following letter:—

“6, Guildhall Chambers,
“December 3d, 1855.

‘Cusin and Another v. Simpson.

“Dear Sir,—In reply to your favour of this day,—as you so strongly advise us to go on with the above action and seem so sanguine as to the result,—we hereby authorize you to proceed to trial, and we shall hold ourselves responsible on M. Cusin's behalf for all costs and expenses; it being distinctly understood that you are perfectly prepared to go on *without delay, and that you will take all the necessary measures for avoiding any delay or irregularity.

“We remain, &c.,
“ORSI & ARMANI.”

The cause of Cusin v. Simpson then went to trial, and on the 19th of December a verdict was obtained for the plaintiffs for 1050*l.* and interest. It did not, however, appear that the amount had been realized. The present action was brought against Orsi & Armani to recover the costs of those proceedings.

*618] *On the part of the defendants, it was submitted that the plaintiff at all events was not entitled to recover the amount of his charges and disbursements in respect of the abortive proceedings against Collingridge & Co. at the suit of the present defendants, inasmuch as he had been guilty of gross negligence in commencing that action without having first ascertained that they had a right to sue on the bills.

For the plaintiff it was insisted, that he was not bound to know that the French law required a special endorsement to entitle Orsi & Armani to sue on the bills; and that he was justified from the instructions which

(a) Code de Commerce, Liv. 1, Tit. VIII, § VI, Art. 136, 137, 138.

he received from them in assuming that they were in a position to maintain the action.

In answer to a question put to them by the Lord Chief Justice, the jury said that they thought (contrary to what was sworn to by Armani) the bills had not been shown to by Mr. Long: but they added, that they thought he ought to have asked for them before he brought the action.

A verdict was found for the plaintiff for 107*l.* 14*s.* 3*d.*; and leave was reserved to the defendants to move to reduce it by the sum of 22*l.* 11*s.* 8*d.*, being the expenses incurred and paid in the action of Orsi *v.* Simpson, less 10*l.*, which the present defendants had paid on account of those costs.

M. Chambers, on a former day in this term, accordingly obtained a rule nisi to reduce the damages by the sum above mentioned, "on the ground that the defendants derived no benefit from the services rendered and business done by the plaintiff, and that the plaintiff did not in respect of such services conduct himself with reasonable and proper skill and diligence, but was guilty of gross negligence as an attorney." He submitted that it was the plaintiff's duty to call for the bills, that he might *see who were the proper persons to sue thereon, before he commenced any proceedings; and that, even if Orsi & Armani [614 had in terms represented to him that they had a right to sue, he still would not have been justified in suing in their names without making the necessary inquiries. The case of *Thwaites v. Mackeson*, 8 C. & P. 841 (E. C. L. R. vol. 14), was referred to.

Byles, Serjt., and *Raymond*, now showed cause.—The question is, whether, under the circumstances, Mr. Long was guilty of such gross negligence in commencing an action in the names of Orsi & Armani upon the instructions which he received from them, as to disentitle him to recover his charges in respect of that abortive proceeding. It is submitted that he was not. Being told by Orsi & Armani that the bills were "unpaid and duly protested in their hands," and the only information of any endorsement thereon being that conveyed by the paper-writing enclosed in their letter of the 23d of November, 1854, the bills themselves never having been shown to him, what other course could Mr. Long take than that which he did take? [JERVIS, C. J.—I think your admission that the plaintiff had notice of the special endorsement to Cusin, Legendre & Co., puts you out of court.] Mr. Long was not bound to know that the law of France requires a special endorsement. And, if he was, when he was told that the bills were endorsed to Cusin, Legendre & Co., and that Orsi & Armani were the holders, he had a right to assume that there was a proper endorsement to them,—a general endorsement. The law of France requires that a bill shall be presented for payment to the acceptor on the precise day of its maturity (without the days of grace which the custom of merchants attaches to English bills of exchange): would Mr. Long be responsible, as for gross negli-

gence, if it had turned out that there was some irregularity in the pro-
 *615] testing of *the bills which precluded the parties from recovering
 on them here? (a) How could Mr. Long be charged with gross
 negligence, when he never saw the bills? [JERVIS, C. J.—The jury
 said he ought to have asked for them.] Orsi & Armani sent him what
 purported to be a copy. If the copy was incorrect, who but the persons
 sending it should be responsible? [JERVIS, C. J.—It is plain that the
 notice to Mr. Long,—who perfectly well knew the French law,—was
 enough to put him on his guard, and to make it his duty to inquire.]
 Is the client to be perfectly passive, and throw all the responsibility
 upon the attorney? Orsi & Armani at all events were contributory to
 the failure of the first action. It is not every slight deviation from the
 best possible course of action that will deprive an attorney of the re-
 munerations due for his services, or render him liable to an action. To
 have this effect, there must be so large an amount of carelessness, or
 such a manifest absence of that fair degree of skill which every attorney
 is bound to possess, as to subject him to a charge of gross negligence.

M. Chambers, in support of his rule, was submitting that the plaintiff
 had been guilty of gross negligence in commencing proceedings upon
 the bills in the names of the present defendants without having first
 ascertained that they were in a position to sue, when he was stopped by
 the court.

JERVIS, C. J.—I am of opinion that this rule should be made absolute.
 The plaintiff, when he commenced proceedings upon the bills in the
 names of Orsi & Armani, knew or had the means of knowing what the
 law of France required. It was his duty to see the bills before he took
 any steps. He would then have known that the action could only be
 *616] brought in the names of *Cusin, Legendre & Co., and so the
 expense of the abortive action he first brought would have been
 avoided.

CRESSWELL, J.—I am of the same opinion. The information which
 Orsi & Armani gave Mr. Long sufficiently showed him that they were
 not in a condition to sue upon the bills. He was obliged to guess at
 something, to justify him in suing out the writ against Simpson. The
 note sent to him showed that there was a special endorsement to Cusin,
 Legendre & Co. I think Mr. Long was clearly guilty of what the law
 calls gross negligence, in omitting to inform himself of the title under
 which Orsi & Armani held the bills.

WILLIAMS, J.—I am of the same opinion. On reading the defend-
 ants' letter, and the copy of the bills which was enclosed therein, a
 prudent man would have paused and made some inquiry before he
 incurred the expense of an action on the bills in their names.

WILLES, J.—Without deciding that an attorney practising here is
 bound to know the French law, I agree with the rest of the court in

thinking that there was such a degree of negligence on the part of the plaintiff as to disentitle him to recover the costs of the action brought by him against Simpson in the names of the present defendants.

Rule absolute.

***HICKMAN v. COX and WHEATCROFT. May 30. [*617**

A. and B., who carried on the business of iron-masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to the trustees, upon trust, amongst other things, to carry on the business under the name of “The Stanton Iron Company,” and out of the profits to pay interest on mortgages, &c., and to “pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts.”—

Held, that, under this deed, the creditors executing it became liable as partners for debts contracted by the trustees in carrying on the trade.

BENJAMIN SMITH and Josiah Timmis Smith carried on business as iron-merchants at the Stanton Iron Works, in the county of Derby, under the name of The Stanton Iron Company. In the year 1849, the Smiths, being in difficulties, executed a deed under which all their property was conveyed to trustees for the benefit of their creditors.

The deed bore date the 13th of November, 1849, and purported to be made between Benjamin Smith and Josiah Timmis Smith (described as carrying on business in copartnership as iron-merchants at the Stanton Iron Works, in the county of Derby) of the first part, Francis Sandars, John Thompson, James Haywood, David Wheatcroft, and Samuel Walker Cox, of the second part, and the said John Thompson, James Haywood, David Wheatcroft, and the several other persons and public companies whose names were set forth in the schedule thereunder written, and whose hands or names and seals were thereunto subscribed and affixed by themselves or their respective partners, directors, trustees, public officers, agents, or attorneys (being respectively joint creditors of the said Benjamin Smith and Josiah Timmis Smith, or separate creditors of the said Benjamin Smith and Josiah Timmis Smith, respectively), of the third part. It then recited that the said Benjamin Smith and Josiah Timmis Smith had for some time *past carried on [*618 business in copartnership as iron-masters and iron-merchants under the firm of Benjamin Smith & Son, at the Stanton Iron Works aforesaid, erected and being in or upon certain lands held (together with the ironstone thereunder) under a lease thereof granted to the said Benjamin Smith and Josiah Timmis Smith for the term of twenty-one years from the 25th of March, 1846, by an indenture dated the 27th

of April, 1846, and made between the Rt. Hon. Philip Henry, Earl of Stanhope, of the one part, and the said Benjamin Smith and Josiah Timmis Smith of the other part : and that the said Benjamin Smith and Josiah Timmis Smith were jointly, and they respectively, or one of them, were or was separately, indebted to the persons and companies parties thereto of the third part, in the several sums set opposite their respective names in the schedule thereunder written,—the first part of which schedule contained the names of creditors of Benjamin Smith separately, the second part thereof the names of creditors of Josiah Timmis Smith separately, and the third part the names of creditors of the said Benjamin Smith and Josiah Timmis Smith jointly : and that the said Benjamin Smith and Josiah Timmis Smith, for the purpose of satisfying their creditors, so far as they might be able, had agreed to assign all their estate and effects unto the said parties thereto of the second part, their executors and assigns, in manner thereafter mentioned, upon the trusts and with and subject to the powers and provisions thereafter expressed and contained : and that it had also been agreed that the several creditors parties thereto of the third part should enter into such covenant not to sue the said Benjamin Smith and Josiah Timmis Smith as thereafter contained. The indenture then witnessed, that, in pursuance of the said agreement, and in consideration of the premises, they the said Benjamin Smith and Josiah Timmis Smith, and *619] each of them, did assign unto Sandars, Thompson, Haywood, Wheatcroft, and Cox, and their executors, administrators, and assigns, all and singular the lands, ironstone, coal, church, or fire-clay and hereditaments comprised in the said indenture of lease of the 27th of April, 1846, and all other the lands, tenements, and hereditaments of or to which the said Benjamin Smith and Josiah Timmis Smith, or either of them, are or is possessed or entitled in reversion, expectancy, or otherwise, for any term or terms of years, either absolute or determinable on any life or lives or otherwise, together with all mines and minerals belonging, erections, works, and fixtures thereon or therein respectively, and all rights, privileges, easements, and appurtenances thereto respectively belonging, either actually or by reputation enjoyed, or otherwise ; and also all and singular the engines, machinery, gearing, plant, movable fixtures, tools, stock in trade, iron, ironstone, limestone, goods, wares, and merchandise, household furniture, plate, linen, china, books of account, book and other debts, sum and sums of money, securities for money, policies of insurance, shares, rights, and interests ; and all other the estate and effects whatsoever and wheresoever of them the said Benjamin Smith and Josiah Timmis Smith, and each of them, in possession, reversion, expectancy, or otherwise ; and all the estate, right, and interest, claim and demand whatsoever, at law or in equity, of them the said Benjamin Smith and Josiah Timmis Smith, and each of them into, out of, or upon the said premises respectively, or any of

them, or any part thereof respectively,—To have and to hold all such and such parts of the premises expressed to be thereby assigned, as were holden for any term or terms of years, unto the said Sandars, Thompson, Haywood, Wheatcroft, and Cox, and their executors, administrators, and assigns, for all the residue or respective residues then to come of *the term or respective terms for which the same re- [620 spectively were then holden, under and subject to the rents, covenants, conditions, and agreements thenceforth on the part of the lessee or respective lessees to be paid, observed, and performed; and to have and to hold all other the premises expressed to be thereby assigned, unto the said Sandars, Thompson, Haywood, Wheatcroft, and Cox, and their heirs, executors, administrators, and assigns, absolutely,—nevertheless, as to all and singular the premises expressed to be thereby assigned, subject to the legal mortgages and encumbrances then affecting the same,—and upon the trusts, and with and subject to the powers and provisions thereafter expressed and contained. The trustees, Sandars, Thompson, Haywood, Wheatcroft, and Cox, were then appointed attorneys for the Smiths, to get in their debts, &c. And it was thereby agreed and declared, that the said Sandars, Thompson, Haywood, Wheatcroft, and Cox, and the survivors and survivor of them, and the executors or administrators of such survivor, should stand and be possessed of and interested in all such and such parts of the premises thereby expressed to be assigned as constituted separate property of the said Benjamin Smith and Josiah Timmis Smith respectively, upon trust that the said trustees or trustee should forthwith, or as soon as circumstances would allow, take possession of, collect, and receive the same, and sell and dispose of and convert into money such parts thereof as did not consist of money, and should pay and divide the moneys to arise from such taking possession, collection, receipt, sale, disposition, and conversion (after defraying thereout all expenses attending the same), and also the net rents, issues, and profits of the said separate property until sale and conversion thereof, unto and among all and singular the separate creditors of each of them the said Benjamin Smith and Josiah Timmis Smith respectively, in *rateable proportions, according to the amount of [621 their respective debts, and to pay over and apply any surplus arising therefrom in manner thereafter directed with respect to the joint property of the said Benjamin Smith and Josiah Timmis Smith, subject, nevertheless, to the provisions thereafter contained. And it was thereby agreed and declared that the said trustees, and the survivors and survivor of them, and their and his assigns, and the executors and administrators of such survivor, should stand and be possessed of and interested in all such and such parts of the premises expressed to be thereby assigned, as constituted joint property of the said Benjamin Smith and Josiah Timmis Smith, upon trust that the said trustees or trustee did and should forthwith, or as soon as circumstances would allow, take pos-

session of the same, and sell, dispose of, and convert into money such parts thereof as should not be necessary to carry on the said business (not exceeding in estimated value the sum of £——), under the trust for that purpose thereafter contained, and collect and receive such parts thereof as consisted of debts or moneys due or owing or payable or to become payable to the said Benjamin Smith and Josiah Timmis Smith jointly, and hold and dispose of the moneys to arise by all or any of such means (after payment thereof of all expenses attending the same), and by the net rents, issues, and profits of the last-mentioned trust premises, until sale and conversion thereof, as part of the gross income to arise from the business to be continued and carried on under the trust in that behalf thereafter contained: *And upon further trust that they the said trustees or trustee, and their or his assigns, did and should continue and carry on, under the name or style of The Stanton Iron Company, the business theretofore carried on by the said Benjamin Smith and Josiah Timmis Smith in copartnership as afore-*
*622] *said, and, for that *purpose, use, occupy, manage, maintain, and*
employ the said work and all other the joint property thereby assigned, in such manner as the said trustees or trustee should deem expedient; with full power for the said trustees or trustee, and they were thereby authorized and empowered, to hold any portion of the trust property for the space of two calendar months from the date thereof undisposed of, if they should so think fit; and, further, for the said trustees or trustee from time to time to sell and convert into money any trust property for the time being used in or held for the purposes of the said business, and which they or he might think it unnecessary to hold or retain, or advisable to dispose of for the purposes thereof, and the money to arise thereby, after payment thereof of all expenses attending such sale and conversion, to be held and disposed of as part of the gross income arising from the said business; and with power as occasion might require to procure any new or renewed lease of any part of the business property for the time being held under lease, on such terms as they or he might deem expedient, and to pay the fines, premiums, and expenses for and attending any such new or renewed lease out of the income arising from the said business; and with power to insure any of the business property, &c.; and with power for the said trustees or trustee from time to time to erect, make, procure, and employ all such buildings, erections, ways, works, engines, machinery, live and dead stock, carriages, tools, implements, conveniences, and things whatsoever, as they or he should think necessary or convenient for the purpose of the said business, and to maintain and keep, repair, alter, remove, dispose of, and replace the buildings, erections, ways, works, engines, machinery, live and dead stock, carriages, tools, implements, conveniences, and things for the time being used in or held for the purposes of the said business, as they or he should think fit; and with power to sell and

*dispose of the iron already or thereafter to be made, obtained, or manufactured, and other the stock in trade for the time being, at such times, upon such terms, and in manner in all respects as they or he should think fit; and with power, for any of the purposes aforesaid, or otherwise in relation to the said business, to employ all such managers, overseers, viewers, clerks, travellers, agents, workmen, miners, servants, and other persons, as the said trustees or trustee should deem expedient, and to pay or allow them such salaries, commission, wages, or other remuneration, as they or he should think fit; and generally with full power for the said trustees or trustee to enter into, make, do, and execute all such contracts, agreements, instruments, acts, deeds, matters, and things whatsoever in or about or in relation to the continuing and carrying on the said business as they or he should think proper, as fully and effectually to all intents, effects, and purposes as if they or he were or was solely and absolutely entitled thereto and to the property employed therein; and it was thereby declared and agreed that the clear rents, issues, and profits of any lands or other property for the time being held for the purpose of the said business should be applied as part of the gross income of the business, and that the said trustees or trustee should by and out of the gross income of the business pay the rents and observe and perform the lessees' covenants and agreements reserved and contained in the said indenture of lease of the 27th of April, 1846, or in any other lease or leases under which any hereditaments for the time being held for the purpose of the business should be holden, and also pay and discharge the interest as it became due and payable upon the said mortgages and encumbrances, and also pay and defray all the costs and expenses of and relating to the preparing, engrossing, and executing those presents, and also all costs and expenses to be incurred from time to time for any of the *purposes thereinbefore expressed in the powers, relating to the said business, and, all other expenses and losses to be incurred or sustained in carrying on the said business as aforesaid; and should pay and divide the net income of the said business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of the said Benjamin Smith and Josiah Timmis Smith, and each of them, in rateable proportions according to the amount of their respective debts,—subject, nevertheless, to the provisions hereinafter contained: provided always, that, in distributing such net income, the same should be deemed and taken to be the joint property of the said Benjamin Smith and Josiah Timmis Smith: And it was thereby agreed and declared that it should be lawful for the trustees or trustee, of their or his own accord, and, upon the request in writing of any two or more joint creditors, parties thereto, whose debts should amount together to 3000*l.*, it should be incumbent upon the said trustees or trustee within seven days after such request, from time to time during the continuance of any of the

trusts thereby declared, to call a meeting or meetings of the joint creditors at any place or places within or near the town of Derby aforesaid [of which notice was to be given in manner therein provided]: And it was thereby also agreed and declared by and between all the parties thereto, that the majority in value of the joint creditors present at any such meeting, including trustees, being creditors, should have full power for the general benefit of the creditors to make, alter, add to, or diminish from the powers, trusts, and provisions therein contained, and to make any rules or directions relative to the discontinuance of the said business, and the present or future management thereof, and of any property for the time being used therein or connected therewith, and relative to the commencement, prosecution, or defence of any *action, *625] suit, or other proceedings, and the payment, agreement, or composition with any party whatever, or any debt, contract, matter, or thing in respect of or relating to the said business or the joint property; and that the same, and all such orders and directions, should be binding and conclusive upon all creditors, whether concurring in making the same or not: And it was thereby further agreed and declared, that, whenever the majority in value of the joint creditors present at any such meeting as aforesaid should order or direct the discontinuance of the said business, the same should be discontinued, either immediately or at such time and in such manner as should be directed by any such order or direction as aforesaid; and thereupon, or as soon thereafter as circumstances would admit of, the said trustees or trustee should wind up the affairs of such business, and sell and dispose of, collect, and convert into money the said works (subject as aforesaid), good-will, stock in trade, assets, and effects thereof, and all other trust property for the time being held for the purpose thereof or connected therewith, and should, by and out of the moneys to arise by such sale, disposition, collection, and conversion into money, pay, defray, and satisfy all the costs and expenses of or attending the same, and the costs of and relating to the preparing, engrossing, and executing those presents (so far as the same should not have been otherwise satisfied), and all the debts, contracts, engagements, and liabilities of the said business which should have been incurred by the trustees or trustee as aforesaid, and all costs, charges, losses, and expenses incurred in the management of the said business, or connected with the carrying on or winding up of the same, and should pay and divide the clear residue of the said moneys unto and among all and singular the creditors of the same. Benjamin Smith and Josiah Timmis Smith, and each of them, in rateable proportions, *626] according to the amount of their *respective debts,—subject, nevertheless, to the provisions hereinafter contained.

The deed then contained provisions for the distribution of the joint and separate estates,—for payment of debts secured by mortgage, &c.,—for the keeping and inspection of accounts, and their production at

meetings,—power to the trustees to compromise debts, to refer disputes to arbitration, to employ the Messrs. Smith to assist in the execution of any of the trusts, to sell by auction, &c., and, the debts being satisfied, to hold the residue for the Messrs. Smith, their executors, &c. Provided always, and it was thereby agreed and declared, that, if the said trustees thereinbefore named, or any of them, or any trustee or trustees to be appointed as thereafter mentioned, should die, or be absent from the kingdom more than six calendar months at any one time, or desire to be discharged from or refuse or become incapable to act in the trusts or powers thereby in them reposed or to them given as aforesaid, before the same should be fully executed, performed, or discharged, or become incapable of effect, then and so often as the same should happen it should be lawful for the surviving or continuing trustees or trustee for the time being, by and with the consent of the majority of creditors in value attending any meeting to be called as aforesaid, or for that purpose specially, from time to time to appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, &c., &c.

The deed further contained the usual indemnity clause, and a declaration that those presents were made with the intention, and upon the condition, that all creditors executing or becoming or otherwise bound by the same, were to accept the provisions for payment of debts thereby made, in full satisfaction of their respective claims and demands upon the said Benjamin Smith *and Josiah Timmis Smith, and each [*627 of them, jointly and respectively, but without prejudice to any rights or remedies as to third persons; a covenant not to sue the said Benjamin Smith and Josiah Timmis Smith, or either of them, and that, “in case any of the said covenanting parties, or any creditors who should become bound by those presents pursuant to the provisions of the Bankrupt Law Consolidation Acts, their or any of their respective heirs, executors, administrators, or assigns, should commence or prosecute any such action, suit, or other proceeding contrary to the true intent of those presents, the said Benjamin Smith and Josiah Timmis Smith, or either of them, their or either of their heirs, executors, or administrators, might plead those presents as a general release in bar thereof;” and a proviso, that, in case the deed should not within three calendar months be executed by or on behalf of six-sevenths in number and value of the joint creditors of the Smiths whose debts respectively amounted to 10*l.* and upwards, the same should be void,—but without prejudice to any acts done by the trustees under or by virtue thereof in the mean time.

This deed was duly executed by the two Smiths, and by Sandars, Thompson, Haywood, Wheatcroft, and Cox, as trustees, and also by the required number of creditors, among whom were Wheatcroft and Cox,

both of whom were also proved to have attended meetings of the creditors held pursuant to the deed.

Cox at first declined to accept the office of trustee, but eventually agreed to do so upon being indemnified; and Wheatcroft resigned the office within six weeks after the execution of the deed, and his resignation was accepted by the other trustees, but no new trustee was appointed in his place.

The business was carried on under the trusts of this deed down to the year 1855, in the name of The Stanton Iron Company. The plaintiff had supplied the company *with iron ore in the years 1853, *628] 1854, and 1855. The supply in the latter year amounted to 1406l. 11s., for which the plaintiff drew three bills of exchange, which were addressed "To the Stanton Iron Company," and accepted "Per Pro. the Stanton Iron Company, James Haywood."

These bills having been dishonoured, the present action was brought against Cox and Wheatcroft, charging them as *partners* in the concern, —either as being trustees, or creditors for whose benefit the business was carried on, or as being persons who had been held out as partners.

The cause was tried before Jervis, C. J., at the sittings at Westminster after last Hilary Term, when a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bills and interest, if the court should be of opinion that the defendants were under the circumstances liable as partners.

Hugh Hill, in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff for 1406l. 11s. and interest, on the ground "that upon the construction of the deed of the 13th of November, 1849, and the evidence given upon the trial, the defendants were liable to the plaintiff for the debt sought to be recovered in this action." He submitted that, the primary object of the deed being, to carry on the business, with a view to the payment of the creditors in full *out of the profits thereof*, the case fell precisely within the principle of the decided cases,—referring to *Pott v. Eyton*, 3 C. B. 32 (E. C. L. R. vol. 54), *Barry v. Nesham*, 3 C. B. 641, *Heyhoe v. Burge*, 9 C. B. 431 (E. C. L. R. vol. 67), *Owen v. Body*, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448, *Janes v. Whitbread*, 11 C. B. 406 (E. C. L. R. vol. 73), and *Coates v. Wilson*, 7 Exch. 205.†

*629] *Byles*, Serjt., and *Milward*, on a former day in this *term, showed cause on behalf of the defendant Wheatcroft.—The only persons who could be liable upon bills of exchange drawn and accepted like the bills in question, are, the persons who are designated on the face of them as "The Stanton Iron Company." Whatever liabilities might be incurred by the *trustees*, who were to carry on the business under the deed of the 13th of November, 1849, the *creditors*, as such, clearly could incur none. It appears that the two Smiths had carried

on business as ironmasters at certain works in Derbyshire, called The Stanton Iron Works; and that, in the year 1849, being in difficulties, they executed a deed under the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 18 Vict. c. 106, whereby they assigned all their property and effects to Sandars, Thompson, Haywood, Wheatcroft, and Cox, upon trust to carry on their business under the style of The Stanton Iron Company, and out of the profits thereof to pay the creditors rateably until all the debts should be fully paid; with a resulting trust for the Messrs. Smith. The deed also contained a provision for the retirement of trustees and the appointment of others in their stead. Availing himself of that provision, the defendant Wheatcroft, shortly after the execution of the deed, viz., on the 27th of December, 1849, resigned the trust, and his resignation was duly accepted by his co-trustees, and he from that time wholly ceased to interfere in the trust, though he continued to be interested as a creditor of the Smiths. He is sought to be made liable in this action upon one of three grounds,—first, as a creditor, for whose benefit, it is said, the business is to be carried on, and whose debt is to be paid out of the profits,—secondly, as a trustee, whose liability, it is contended, remains notwithstanding his resignation of the trust before the debt in respect of which it is sought to charge *him was contracted,—thirdly, as one who has per- [*630
mitted himself to be held out as a party liable.

1. The circumstance relied on to show that all who execute the deed as creditors are liable, is, that the business is to be carried on for their benefit, inasmuch as their debts were to be paid out of the profits. But the same might be said in every case where a man lends money to a partnership: it is always expected to be paid out of the profits. This, however, is not an open question: it is *res judicata*. Upon a petition by Wheatcroft to have the affairs of this company wound up under the statutes 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108,—In *re The Stanton Iron Company*, 25 Law Journ. Ch. 142,—the Master of the Rolls says: “Persons may be partners towards the world, without being partners between themselves; it is a common case. The leading case is *Waugh v. Carver*, 2 H. Bl. 235. But persons, if they are partners between themselves, are undoubtedly partners in respect of the public. *This is not a deed constituting a partnership between the parties of the third part who have executed this deed*: it is a deed for the benefit of Messrs. Smith, rather than of the creditors. The profits, or the residue of the profits, are to be considered as the property of the Messrs. Smith: the persons executing the deed are not held out to the world as partners, or as having anything to do with the partnership; and there is no ground for supposing that they could, under any circumstances, be personally liable to the creditors in the management of the business. In the case of a partnership, you have to consider what is the proportion of stock and labour which is introduced by each of the partners, and the proportion in which

the profits or dividends are to be divided. I assume that the argument of the petitioner is right, that the amount of stock or capital contributed *631] is the amount of the debt of each party: but, suppose this was a new concern, and that, instead of debts forming the stock, the creditors who were the parties of the third part actually advanced the sums of money which now stand opposite their names in the deed,—suppose one, two, or twenty persons (the number can make no difference) advanced certain sums of money to five other persons, to establish and carry on a business, on condition that out of the profits they shall be paid the sums they have advanced simply, and that the business shall then be transferred, and that the surplus beyond shall belong to certain other parties,—that is a mere loan to establish a partnership: were I to hold persons to be partners under these circumstances, it would be hardly possible for any one to advance money to a partnership without making them partners. It wants the ordinary test and criterion of a partnership. There are many difficult cases, as, those in which parties are to be paid an annuity: if it rises and falls in proportion to the amount of the profits, they then become partners; they get a share of the profits, and their interests are affected by the rise and fall of the profits. But here, the difference in the rate of profits affects these persons no more than this, that it will be a little later, but they get the same amount actually, (a) whatever be the rate of the profits, assuming of course the business produce profits. The fact that a loan is to be paid out of profits does not make the persons lending partners; and, unless you establish the fact that they take a proportionate rate of the profits as such, it is difficult to see how they could be made partners. *It is, therefore, impossible to hold that the parties to this deed of the third part are partners liable to contribute to the losses which have been sustained by those persons who have been carrying on the business.* No such decision has *632] ever yet been made." [WILLIAMS, J.—They are to receive the *profits: the deed gives them the specific money.] They are not to take a rateable proportion of the profits as such: they are to receive specific sums, provided the fund is realized. [WILLIAMS, J.—Is not that contrary to *Owen v. Body*, and to the decision of this court in *Janes v. Whitbread*?] *Owen v. Body* has been so reflected on that it can no longer be considered to be law. The Master of the Rolls, in the case referred to, says: "In *Owen v. Body* there was a trust for carrying on a business, similar to the present. There, two persons, who had not executed the deed, issued execution against the property assigned, on the ground that the deed was invalid and a nullity. The question was, whether it was a good assignment; and the court held that it was not: Lord Denman says: 'On consideration, we think, that, upon the second ground of objection, this assignment was not good; the deed imposed such terms as might have constituted a partnership among

the persons executing it, and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid.' All that was decided, therefore, was, that the assignment was invalid. If that case applied to the present, it would decide that the present agreement is invalid: it certainly does not decide that it constituted a partnership, or that any valid or legal partnership was constituted by reason of that being done. The subsequent cases referred to show that the court would hold that the parties would not be partners, and that a subsequent creditor of the concern could not have sued any one of the parties to the deed of the third part, and made them liable for any contract entered into by the five persons who carried on the business. The persons who carried on the business are, no doubt, liable to the public; but, as to the others, they are merely cestuis que trust, and the limited purpose of the deed was, to pay, not a proportion of the profits, but a certain fixed sum *of money out of the partnership property, and then to pay the remainder to the Messrs. Smith." [*633 [WILLES, J.—The provisions of the winding-up acts in equity apply only to the parties inter se. Those cases, therefore, have very little application on questions like this.] It clearly never could have been in the contemplation of these parties, that, by merely executing the deed as creditors, they should render themselves liable for all debts which the trustees might contract in carrying on the business. See the condition that such a construction would place them in. Having once executed the deed, and thereby become partners, they would have no means of withdrawing. Then, this being a deed of arrangement under the 224th section of the 12 & 13 Vict. c. 106, the concurrence in which by six-sevenths of the creditors in number and value binds the whole, a party might be equally bound whether he executed it or not. He would thus become a partner by the acts of others over whom he has no control. [JERVIS, C. J.—A deed like this, which provides for the carrying on of the business, is not within the bankrupt act.] The 224th section contemplates deeds relating to the "conduct and management" of the affairs of the debtor. [JERVIS, C. J.—It means the conduct and management of the estate with a view and for the purpose of distribution. In *Tetley v. Taylor*, 1 Ellis & B. 521, 532 (E. C. L. R. vol. 72), the Exchequer Chamber expressly held, that that section does not make any deed of arrangement binding on a creditor who has not executed it, unless such deed provides for the distribution of the whole of the trader's estate as in bankruptcy.] The decision of this court in *Janes v. Whitbread* proceeded on the ground, that, by the terms of the deed, the carrying on the trade was merely subsidiary to the general purpose of sale and distribution. And *Coates v. Williams* merely adopted the previous decisions in *Owen v. Body* and *Janes v. Whitbread*.

*2. There is no pretence for charging the defendants merely as trustees. And, if they could be so charged, it clearly could [*634

only be in respect of acts done by them as such, and for contracts entered into whilst they continued to be trustees.

Bovill, Welsby, and Boden, for the defendant Cox.—If all the creditors who execute the deed are to be considered as partners, they must be partners with one another and with the Messrs. Smith. Surely that is a very alarming and a very absurd result of such a deed as this. If that were so, every next of kin for whose benefit executors carry on the business of their testator, is a partner with them. [WILLIAMS, J.—If done at their request. It is the same question. WILLES, J.—Suppose two men agree to carry on business until they realize 10,000*l.*, would they not be partners?] No doubt they would. [WILLES, J.—Suppose a body of creditors enter into the same agreement?] The same result would follow. But here the creditors do not so agree. The decision of the Master of the Rolls in the case before him clearly and satisfactorily shows that this deed does not constitute a partnership in the manner suggested. All what was *decided* in *Owen v. Body*, was, that the deed there was not a valid deed: the court did not decide, nor was it necessary for them to decide, that the creditors were partners. [WILLIAMS, J.—What term is there in the deed in *Owen v. Body*, which is not found in this deed?] They certainly are nearly identical. *Waugh v. Carver*, 2 H. Bla. 235, *Grace v. Smith*, 2 W. Bla. 998, *Pott v. Eyton*, 3 C. B. 32 (E. C. L. R. vol. 54), *Barry v. Nesham*, 3 C. B. 641, and *Heyhoe v. Burge*, 9 C. B. 434 (E. C. L. R. vol. 67), are considered to have carried the doctrine of constructive partnership as far as it conveniently can be; and the court will not be disposed to extend it. The *635] creditors here are to be paid *out of profits, if profits are made: but, in what does that differ the case from that of every loan to a firm? Suppose, instead of the stipulation that the business should be carried on by the trustees, the deed had stipulated for its being carried on by the Messrs. Smith, and the creditors had agreed, as here, to receive payment rateably out of future profits,—could it in that case have been said that the creditors were partners and members of The Stanton Iron Company? The trustees are the agents of the Messrs. Smith: they are appointed by them, and not by the creditors, who are mere assenting parties. This case, it is submitted, must be governed by *Janes v. Whitbread*. The trustee there was “to employ the said James Ellis, or any other person or persons, in winding up the affairs of him the said James Ellis, and in collecting and getting in his estate and effects thereby assigned, *and in carrying on his trade*, if thought expedient by him.” The carrying on the trade was held to be subsidiary to the main purpose of the deed, viz. the liquidation of the debts of the assignor, and therefore the deed was held to be valid. Speaking of *Owen v. Body*, Jervis, C. J., there says: “Upon examining that case, I am of opinion that it is not applicable to the present; for, there, the deed contained minute provisions investing the trustees with power

to carry on the trade, for which purpose they were authorized to lay out money in payment of rent, &c., and in keeping up the stock : and the court held the deed void, as being one which creditors could not reasonably be expected to become parties to. Here, however, the deed contemplates the sale of the property, and the winding up of the business ; and the power given to the trustee to carry on the trade, was evidently intended to be merely subsidiary to the winding up of the concern." So, here, the carrying on the trade was merely subsidiary to the purpose of liquidating the debts.

**Hugh Hill and Field*, in support of the rule.—The main question is, whether the deed comes within the cases of *Owen v. Body and Janes v. Whitbread*. It begins by reciting that the Messrs. Smith are indebted to the several persons parties thereto of the third part, and that they have agreed to assign all their estate and effects for the benefit of their creditors : it then proceeds to assign all their property and effects to the trustees, upon trust to carry on the business under the name of The Stanton Iron Company,—and the clause empowering the trustees to take new or renewed leases contemplates the possibility of the business being so carried on longer than twenty-one years,—and to pay and divide the profits arising therefrom to and among the creditors rateably in proportion to their respective debts. In *Janes v. Whitbread*, the power given to the trustee, in the first instance, was, to wind up the affairs : and Maule, J., referring to *Owen v. Body*, says,—“ The main object of the deed in that case was, the carrying on of an extensive business, for the purpose of making money to pay the creditors who became parties to the deed. Here, the object is, merely to wind up the concern. That is a clear, plain, and intelligible distinction.” It is impossible to conceive language more applicable to a deed framed as this is. In giving judgment in *Owen v. Body*, Lord Denman says,—“ The deed imposed such terms as might have constituted a partnership among the persons executing it ; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid.” That is an express decision of a court of co-ordinate jurisdiction, that a deed such as this does create a partnership. The grounds of objection to that case urged in the case before the Master of the Rolls are not satisfactory. It is not necessary to contend that the creditors here became partners inter se : it is enough to say, that, where a man contracts to receive a *proportionate part of the profits of a concern he thereby becomes a partner. In *Pott v. Eyton*, 3 C. B. 82, 39 (E. C. L. R. vol. 54), Tindal, C. J., says : “ Traders become partners between themselves by a mutual participation of profit and loss : but, as to third persons, they are partners if they share the profits of a concern ; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be

made liable to losses, although he may have expressly stipulated for exemption from them: *Grace v. Smith*, 2 W. Bla. 998; *Waugh v. Carver*, 2 H. Bla. 235." That is exactly what the creditors have stipulated for here. [JERVIS, C. J.—It certainly is difficult to say that they are not stipulating for a share of the profits.] Again, in *Barry v. Nesham*, 3 C. B. 641, 655, *Wilde, C. J.*, says: "All the cases seem to agree, that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for, it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise." In *Heyhoe v. Burge*, 9 C. B. 431 (E. C. L. R. vol. 67), the court took it for granted that the agreement for a participation in profits created a partnership. *Cresswell, J.*, in delivering the judgment of the court, said,—p. 458,—"It has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction, constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken." It is submitted that *Owen v. Body*, as recognised and explained in *Janes v. Whitbread*, is a sound and a good and just rule. In *Grace v. Smith*, *De Grey, C. J.*, says: "Every man who has a *share
*638] of the profits of a trade ought also to bear his share of the loss. And if any one takes a part of the profits, he takes a part of that fund out of which the creditor of the trader relies for payment." *Coope v. Eyre*, 1 H. Bl. 37, *Gilpin v. Enderbey*, 5 B. & Ald. 954 (E. C. L. R. vol. 7), and *Bond v. Pittard*, 3 M. & W. 357,† were also referred to.

As to the liability of the defendants as trustees,—*Cox*, on being proposed as a trustee, objected to become one unless indemnified. He accordingly received an indemnity, and then he consented, and acted as a trustee. [JERVIS, C. J.—It is hardly worth while to discuss this. You cannot make out a case against *Wheatcroft*, as a trustee, and there is no leave reserved to amend: it would only, therefore, go to a new trial.]

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court:—

Having duly considered this case, we are of opinion that the rule must be made absolute. The case, in fact, is expressly bound by the authority of *Owen v. Body*, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448, which is recognised, and its principle clearly and neatly stated by *Maule, J.*, in *Janes v. Whitbread*, 11 C. B. 406 (E. C. L. R. vol. 73), shortly before we had the misfortune to lose him.

The question is, whether the creditors, by signing this instrument, have made themselves partners. And we think, upon the authorities referred to, as well as upon the reason of the thing, that they have done so. They agree together to carry on the business, under the

superintendence or agency of a manager, for their mutual benefit; and, though they do not take an interest in the profits of the concern expressly as partners; yet they do participate in the profits, inasmuch as their claims are to be rateably paid out of the fund to be formed by such profits; and this, according to the authority of *Owen v. *Body and Janes v. Whitbread*, makes them liable as partners [*639 upon the bills accepted by the firm of which they so became members.

On this ground we think the rule to enter a verdict for the plaintiff must be made absolute. Rule absolute.(a)

. (a) An appeal is now pending.

WARD v. CARDWELL. June 12.

The court will not enlarge the time for showing cause against a rule to enter a suggestion under the city small debts act, to deprive the plaintiff of costs, in order to enable the plaintiff to apply to the judge for a certificate.

THOMAS, Serjt., on a former day in this term, obtained a rule nisi for a suggestion under the city of London small debts act, 15 & 16 Vict. c. lxxvii., s. 119, to deprive the plaintiff of costs. The cause was tried before Crowder, J., on the 6th instant, and a verdict found for the plaintiff for 25*l*. The affidavit contained all the allegations necessary to entitle the defendant to have a suggestion entered, as was admitted by

Beasley, who now appeared for the plaintiff, and prayed that the rule might be enlarged, in order to give him an opportunity of applying to the learned judge to certify that there was sufficient reason for bringing the action in the superior court.

Per Curiam.—You should have applied earlier. The rule must be made absolute.

*HAWKINS v. ALDER. May 27.

[*640

In an action for negligently driving against and killing a horse of the plaintiff proved to be worth 30*l*., the jury,—there being strong evidence to negative negligence on the part of the defendant, and some evidence the other way.—contrary to the opinion of the judge, found for the plaintiff, damages 15*l*.:—The court refused to grant a new trial on the ground of the verdict being perverse.

Semble, that the 44th section of the Common Law Procedure Act, 1854, which in some measure places the costs, on motions for new trials on the ground of the verdict being against evidence, in the discretion of the court, has not altered the rule which precludes the grant of a new trial in such cases where the damages are under 20*l*.

THIS was an action in which the defendant was charged with having negligently driven against and killed a horse of the plaintiff.

The cause was tried before Jervis, C. J., at the sittings in London after the last term. The horse was proved to have been worth 30*l*. There was contradictory evidence as to the cause of the accident; but, in the opinion of his Lordship, the evidence greatly preponderated in favour of the defendant, and he so told the jury. They, however, returned a verdict for the plaintiff, damages 15*l*.

Hayes, Serjt., now moved for a new trial, on the ground that the verdict was perverse,—being contrary to the direction of the judge, and manifestly the result of a compromise amongst the jury, who from the amount of damages they gave must evidently have considered that there was negligence on the part of the plaintiff. [JERVIS, C. J.—I certainly expected the verdict would have been for the defendant; but, at the same time, I am bound to say that there was evidence on both sides. I cannot say the verdict is perverse, which means, as I understand, where there is no dispute about the facts, and the jury, disregarding the direction of the judge as to the law, choose to take the matter into their own hands, and substitute their own arbitrary notion of rough justice.] Then, the verdict was clearly against the weight of the evidence. [JERVIS, C. J.—There you are met by the rule as to a *641] verdict under 20*l*.] That rule, it is submitted, no *longer applies. The reason for it, viz., that it would be mercy to the applicant to refuse the rule, seeing that he must pay the costs of the first trial as a condition, was removed when it was enacted by the 44th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, that, “when a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order.”

JERVIS, C. J.—Although I must confess, that, if I had been on the jury, I should have found the other way, I think there ought to be no rule. The jury did not take the same view that I did: but I cannot say they were so entirely wrong as to feel justified in taking the matter out of their hands: there was some evidence on both sides.

WILLIAMS, J.(a)—I agree with my Lord, though with some reluctance, that there ought to be no rule. If one were granted, it clearly would be discharged. I cannot see that there was misconduct on the part of the jury so as to make the verdict a perverse one.

WILLES, J.—I am of the same opinion. I do not think the 17 & 18 Vict. c. 125, s. 44, has altered the rule upon which the courts have so many years acted, in refusing to grant a new trial on the ground of the verdict being against evidence, where the damages are under 20*l*.

Rule refused.

(a) Crosswell, J., was absent.

***MASON v. MUGGERIDGE. June 4. [*642**

Service of a rule under the 60th section of the Common Law Procedure Act, 1854, upon the wife of the party, without showing that it came to his knowledge, is not sufficient.

PATERSON moved for an attachment against the defendant, a judgment-debtor, for not appearing before the master pursuant to a judge's order (made a rule of court), to be examined as to debts due to him, under the 60th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.(a) The affidavit upon which he moved alleged a service of the rule upon the defendant's wife on the 20th ultimo; but there was no allegation that it had ever come to the defendant's knowledge.

Per Curiam.—The service is insufficient. Rule refused.

(a) Which enacts that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act." (under s. 51.)

***TETLEY v. EASTON and Another. June 4. [*643**

It is no ground for refusing to answer interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions.

THIS was an action for an alleged infringement by the defendants of a patent granted to the plaintiff on the 11th of February, 1846, for a centrifugal pump.

The plaintiff having obtained an order under the 51st section of the Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125,—for the exhibiting of interrogatories to the defendants, the following were (amongst others) delivered:—

"1. Did you manufacture the centrifugal pump now in or being erected in the Crystal Palace at Sydenham, upon which the name of your firm is inscribed above the supports of and near to the discharging orifice?

"2. Did you exhibit that pump at the late exhibition in Paris in 1855? If not, then for whom did you manufacture it, and to whom did you sell or lend it? And, if you have since made any variations in its construction, state what those variations are.

"3. Did you manufacture the centrifugal pump erected and now or late in use at the Tottenham sewage works, in the county of Middlesex? And, if so, by whose order did you manufacture it, and when and

where was it manufactured and delivered? *And state the names and addresses of the persons or person to whom you sold it, and when you sold it, and at what price.*

"4. How many centrifugal pumps have you made and sold between the 21st of April, 1855, and the 5th of May, 1856? And state whether any, or which, out of the whole number so made and sold between those dates, had or had not foot-valves or retaining-valves.

*644] "5. Distinguish how many of those were sold and *delivered previously to the first-mentioned pump being exhibited in Paris, and how many since.

"7. *State the names and addresses of the several persons to whom the said pumps respectively have been sold within the said periods, and the prices at which they were respectively sold, together with the diameter of the apertures into the pans of such pumps respectively.*

"8. *Where are or were the said pumps respectively in use, or sent to be used? And, are any of them, and which, now under your control? Mention those especially which within your knowledge now are, or within the last three months have been, in use within fifty miles of London.*"

Hindmarch, upon an affidavit that the plaintiff had already unsuccessfully brought two actions against the defendants for the alleged infringement of his patent,^(a) and that there was no novelty in the alleged invention, moved for a rule calling upon the plaintiff to show cause why so much of the interrogatories as required the defendants to state the number of pumps they had made according to the plaintiff's plan, and the names and addresses of the persons to whom they had sold them, should not be struck out. He submitted that the information sought could not be necessary to enable the plaintiff to make out his case, and that the defendants ought not to be called upon to expose their customers to actions.

*645] JERVIS, C. J.—That the customers may be exposed to *actions, is no objection. If you admit the infringement, the plaintiff is entitled to the information he asks. The defendants must answer the interrogatories.

The rest of the court concurring,

Rule refused.

(a) The specification produced on those two occasions claimed too much: but there had since been two disclaimers entered pursuant to the statutes. See 5 & 6 W. 4, c. 83, s. 1, 7 & 8 Vict. c. 69, s. 5, and 15 & 16 Vict. c. 83, s. 39.

KNIGHT v. COX. *June 9.*

Payment of rent under a distress is not a conclusive admission of title in the distrainer, but may be rebutted by showing that he never had any title.

The plaintiff claimed as executrix and devisee of the administratrix of one of three lessors, and showed that rent had been paid by the defendant (the lessee) to her testatrix and to herself,—on two occasions, after distress:—Held, that this *prima facie* case was answered by showing that one of the other lessors was still living.

THIS was an action for use and occupation, to which the defendant pleaded never indebted.

The cause was tried before Willes, J., at the sittings in Middlesex after the last term. The facts which appeared in evidence were as follows:—The defendant became tenant of the premises in question under a lease which was granted to him on the 28d of April, 1842, for the term of twenty-one years from the 25th of March then last, by William Beaufort Cullen, Edward Beaufort Cullen, and Elizabeth Cullen, at the yearly rent of 100*l.* payable quarterly.

William Beaufort Cullen, who had been in the Austrian service, died in Transylvania on the 16th of August, 1848, unmarried, and intestate; and letters of administration of his goods and chattels were duly granted to his mother, Mrs. Elizabeth Power Cullen, on the 8th of August, 1850.

Edward Beaufort Cullen, it was proved, had gone to Sydney, and was, as appeared from a letter received from him, dated October, 1854, still living. Elizabeth Cullen died on the 27th of August, 1849.

The plaintiff launched her case by showing that the rent of the premises in question had been regularly paid by the defendant to Edward Beaufort Cullen down to the *year 1850, and since then to Mrs. Elizabeth Power Cullen until her death; that she (the plaintiff) [*646 was sole devisee and executrix under the will of Mrs. Cullen, which was proved in the Prerogative Court of the Archbishop of Canterbury on the 16th of January, 1852; that, on the 15th of June, 1852, she distrained for the quarter's rent which became due on the 25th of March, which distress the defendant submitted to by paying the rent and expenses; and that, on the 22d of November, 1855, she again distrained for a quarter's rent of the premises which became due at the preceding Michaelmas Day, and that the defendant paid the amount and expenses.

She also put in the letters of administration granted to Mrs. Elizabeth Power Cullen, and the probate of Mrs. Cullen's will: and it was insisted, on her behalf, that the payment of rent by the defendant to the plaintiff, and particularly the fact of his submitting to two distresses, was such conclusive evidence of acquiescence in her title as to preclude him from disputing it.

For the defendant it was submitted that the plaintiff was not entitled to recover, the evidence showing that she was not the executrix of the *surviving lessor*.

Under the direction of the learned judge, a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for her for 25*l.*, if the court should be of opinion that the defendant was under the circumstances precluded from disputing her title.

Byles, Serjt., on a former day in this term, obtained a rule nisi accordingly. He submitted, that, if this had only been the case of a payment of rent, the plaintiff's case was not answered by the mere suggestion that Edward Beaufort Cullen, the third lessor, was still living; and that, at all events, the submitting to a distress at the plaintiff's suit was equally conclusive against *him as if judgment had
*647] passed against him on a plea of non tenuit to an avowry for the rent. *Green's Case*, Cro. Eliz. 8, *Panton v. Jones*, 3 Camp. 372, and *Smith's Leading Cases*, 654, were referred to.

Hawkins now showed cause.—The defendant held under the lease granted to him on the 23d of April, 1852, by William Beaufort Cullen, Edward Beaufort Cullen, and Elizabeth Cullen, and that lease had not expired. The rent, it appears, had at first been paid to Edward Beaufort Cullen; and afterwards, Elizabeth Cullen dying, Edward Beaufort Cullen going to Sydney, and William Beaufort Cullen also dying, the rent was paid to the mother Elizabeth Power Cullen (who had taken out letters of administration to William Beaufort Cullen) until her death: and, after the death of Mrs. Elizabeth Power Cullen, the defendant paid rent to Miss Knight, the plaintiff, the sole devisee and executrix of Mrs. Cullen, believing her to be the person legally entitled to receive it. It was not pretended that there had been any release or assignment of the interest of Edward Beaufort Cullen, or that there had been any fresh holding: but the plaintiff relied upon the fact of the defendant having admitted her title by submitting to two distresses. The mere submission to a distress, however, clearly can have no more effect as an admission of title, than payment of rent. It may be *prima facie* evidence of title; but it is not conclusive. In *Fenner v. Duplock*, 2 Bingh. 11 (E. C. L. R. vol. 9), 9 J. B. Moore, 38 (E. C. L. R. vol. 17), it was held, that payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the
*648] lessor's title has expired. Best, C. J., there says: **“Payment of rent may indeed be evidence of an attornment; but, before we can decide whether an attornment has taken place, we must look at the circumstances, and see whether they do not rebut the presumption of an attornment.”* Here the plaintiff shows no title whatever. [CRESSWELL, J.—It might be *prima facie* evidence of a seisin in fee.] True: but the evidence offered on the part of the defendant was sufficient to rebut that.

Byles, Serjt., and *Needham*, in support of the rule.—The plaintiff came into court with strong *prima facie* evidence,—two distresses for rent acquiesced in by the defendant by payment of the rent claimed and the expenses. It lay upon the defendant to displace the case so made, by showing clearly and unequivocally that the plaintiff was not entitled to the reversion. In order to do this, the defendant put in the lease granted to him by William Beaufort Cullen, Edward Beaufort Cullen, and Elizabeth Cullen, for a term yet unexpired. It appeared that the rent was reserved to the three lessors; but, whether they were joint tenants or tenants in common, did not appear; if the former, the rent would go to the survivor, and there was no evidence that Edward Beaufort Cullen was dead. The defendant was bound to encounter all the possibilities of the plaintiff's having title. The submitting to the distresses was an acknowledgment of the tenancy under the plaintiff, the distrainer: *Panton v. Jones*, 3 Campb. 372. Bayley, B., there says,—“I have no doubt that submitting to a distress acknowledges the tenancy. The landlord, after distraining, cannot bring ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord.” For the former of those propositions, *Green's Case*, Cro. Eliz. 3, is a distinct authority. There, in *ejectione firmæ* the case was this,—“a prebend let land to Green for years, rendering rent, *and a re-entry for non-payment. The rent was demanded, and was not paid, and two days after the lessor received the rent of [*649 him, and maketh him an acquittance by the name of his fermor: and if this receipt doth bar him of his re-entry, was the question. And it was clearly resolved that the bare receipt of the rent after the day was no bar, for, it was a duty due to him; but a distress for the rent, or a receipt of rent due at another day, was a bar, for, those acts do affirm the lessee to have lawful possession: so, if he maketh him an acquittance, with a recital that he is his tenant: and, in this case, by calling him his fermor, it is a full declaration of his meaning to continue him his tenant.” [CRESSWELL, J.—Suppose two of the three lessors had died, and the survivor sued for the rent, there being nothing to show the quality of the estate, would he not be entitled to maintain the action?] There would be no counter-presumption there. [JERVIS, C. J.—The evidence given by the plaintiff was *prima facie* sufficient, until answered. But I think the circumstances fairly accounted for the payment of the rent to the plaintiff.] In *Green's Case*, the court take a great distinction between mere payment of rent and the submitting to a distress. Judgment against the tenant upon a plea of non tenuit would have been an undoubted estoppel: and submission to the distress is not less so. In *Cooper v. Blandy*, 1 N. C. 45 (E. C. L. R. vol. 27), 4 M. & Scott, 562 (E. C. L. R. vol. 30), the plaintiff came into occupation under one who had paid rent upon distress by the defendant; and it was held, that, after proof of this fact, the plaintiff was estopped to dispute the plaintiff's title to the

rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger. Tindal, C. J., there says: "Nightingale and Perry have already admitted the defendant's title as landlord. If they apprehended a claim *from any
*650] other quarter, why did they not dispute his title when he levied a distress for rent? Their abstaining from dispute at that time, is an admission that he had a right to the rent; and, why are we to presume, in favour of one who has admitted the landlord's title, by payment of rent under a distress, that the landlord is not entitled to receive it?" And Bosanquet, J., adds: "As a general rule, it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title." That case is exactly in point. The case might have been different here, if the defendant had shown that the title *could* not have been in the plaintiff at all.

JERVIS, C. J.—I am of opinion that this rule should be discharged. The evidence given on the part of the defendant did not show absolutely that the title was out of the plaintiff and in some one else; but it showed a reason why he paid the rent. Payment of rent, even under a distress, is not a conclusive admission of title.

CRESSWELL, J.—We have no right to assume against the defendant those facts which were necessary to sustain the action. I think the defendant showed a *prima facie* defence.

WILLIAMS, J.—I also think there was enough in the evidence to show that the *prima facie* case made out by the plaintiff, though undoubtedly very strong, of a submission to two distresses for rent, was met by the counter evidence given on the part of the defendant.

WILLES, J.—I am of the same opinion. It is clear that there was no tenancy except under the lease of the 23d of April, 1842. The plaintiff could not be the person entitled to receive rent under that
*651] lease, unless *there was a conveyance to her, or to her testatrix, from the surviving lessor. It was for the plaintiff to show that she in some way represented or claimed under the surviving lessor. This she failed to do.

Rule discharged.

**PENNELL and Others, Assignees of GEORGE FOSSEY and
JAMES STEEL, v. WALKER. June 12.**

F. and S. having brought an action against W. to recover the price of timber delivered under a contract, and W. having brought a cross action in which he sought to recover damages against F. and S. for alleged breaches by them of the same contract, the two actions, and all matters in difference between the parties, were referred to arbitration. Before anything was done under the reference, F. and S. became bankrupts; and their assignees brought a fresh action against W. for the price of the timber.

Upon a motion, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to stay the proceedings in the last-mentioned action:—Held, that, assuming the section to apply to such a case (which the court inclined to think it did not), it was not one in which they would in the exercise of their discretion interfere, inasmuch as by so doing they would be giving W. an advantage which the law did not entitle him to.

Semble, that assignees of a bankrupt are not “persons claiming through or under the bankrupt,” within the meaning of the above section.

ON the 22d of October, 1855, Fossey and Steel brought an action against Walker to recover a balance alleged to be due from him to them for timber supplied under a contract, for the purpose of being used by the defendant in the preparation of huts and buildings for the use of the army in the Crimea. The defendant (Walker) had previously, viz. on the 26th of September, 1855, brought an action against Fossey and Steel for damages alleged to have been sustained by him in consequence of their failure to supply the timber of a proper description and at proper times pursuant to the contract. The first-mentioned action being at issue, and the defendants (Fossey and Steel) having pleaded in the second, the attorneys for the respective parties agreed upon terms of reference, and signed a draft thereof, whereupon a judge's order was made, by consent, on the 19th of December, referring both causes, and all matters in difference between the parties thereto, *to arbitration,—the respective costs of the actions respectively to abide the event of the award as to the said actions respectively, and the costs of the reference and award to be in the discretion of the arbitrator. No meeting had taken place before the arbitrator. [652]

On the 25th of January last, Fossey and Steel became bankrupts, and the now plaintiffs, who were duly appointed assignees under the fiat, on the 29th of April, commenced this action for the recovery of the same alleged debt as was sought to be recovered in the action first above mentioned.

Upon an affidavit of these facts, and alleging “that the defendant was at the time of the bringing of the action, and still was, ready and willing to join and concur in all acts necessary and proper for causing such matters to be so decided by arbitration; that he believed that no sufficient reason existed why such matters could not be, or ought not to be, referred to arbitration, according to the said agreement or order; and that he was advised and believed, that, if the plaintiffs (the assignees) were allowed to proceed in the present action, he would be deprived of the benefit of the said agreement or order according to which he was

entitled to have, and would have, such damages as might be recoverable in the action brought by him as aforesaid (so far as such damages should extend or be required for such purpose) set against such sum (if any) as was recoverable against him upon the said contract, or for the timber so supplied to him by Fossey and Steel, so as either wholly to discharge or to go in reduction of such claim (if any) as could be substantiated against him in respect thereof."

Monk, on a former day in this term, moved for a rule calling upon the plaintiffs to show cause why the proceedings in this action should not
 *658] be stayed, under the *11th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit; provided always, that any such rule or order may at any time afterwards be discharged or varied, as justice may require." [JERVIS, C. J.—By interfering in the manner prayed, we should be defeating the claim of the assignees against the defendant, when the latter could not recover damages against the assignees for the alleged breach of contract by the bankrupts. WILLIAMS, J.—The assignees are no parties to the agreement to refer.] They claim through or under the bankrupts. Bankruptcy is no revocation of
 *654] a submission to arbitration: **Taylor v. Shuttleworth*, 6 N. C. 277 (E. C. L. R. vol. 37), 8 Scott, 565; *Hemsworth v. Brian*, 1 C. B. 131, 138 (E. C. L. R. vol. 50). [WILLES, J.—You want to establish a case of mutual credit, or something analogous. In effect, you are seeking to enlarge the mutual credit clause of the bankrupt act (12 & 13 Vict. c. 106, s. 171) by the 11th section of the 17 & 18 Vict. c. 125. The object of this last-mentioned clause, is, to compel parties who have agreed to refer, and persons claiming through or under them, to perform

their contracts. Assignees do not in this sense claim through or under the bankrupt.]

JERVIS, C. J.—The point being a new one, you may take a rule; but you must not be surprised if it is discharged with costs.

J. Brown now showed cause.—This is not a case within the 11th section of the 17 & 18 Vict. c. 125. It is not the case of a reference by “deed or instrument in writing;” and a reference by judge’s order is not within the section. The mischief aimed at was this: before the statute, if parties agreed in the most solemn manner to refer, and either of them afterwards thought fit to bring an action in respect of any matter included in the agreement of reference, the court had no power to stay the proceedings,—a difficulty which did not exist where the reference was by order of Nisi Prius or by judge’s order, inasmuch as the court had power over their own order. Reliance may, however, be placed upon the draft of the terms of reference which was agreed upon and signed by the respective attorneys. But that is not an agreement inter partes; it is a mere approval by the respective attorneys of the terms of a proposed judge’s order. A draft so approved and signed was held insufficient, in *Filmer v. Burnby*, 2 Scott, N. R. 689, 703, 2 M. & G. 529 (E. C. L. R. vol. 40), to prove a contract. Then, the assignees *are not “persons claiming through or under” the [*655 bankrupt, within the meaning of the section. They claim adversely to the bankrupts. That bankruptcy is no revocation of a submission, is clear: *Taylor v. Shuttleworth*, 6 N. C. 277 (E. C. L. R. vol. 37), 8 Scott, 565; *Hemsworth v. Brian*, 1 C. B. 181, 138 (E. C. L. R. vol. 50; *Taylor v. Marling*, 2 Scott, N. R. 374, 2 M. & Gr. 55 (E. C. L. R. vol. 40): but, that the reference is subsisting, is no ground for staying proceedings in the action at the suit of the assignees, who are not, and cannot be compelled to become, parties to the reference,—*Sturges v. Lord Curzon*, 7 Exch. 17.† The bankruptcy transfers the debt to them, but not the liability.

Hugh Hill and *Monk*, in support of the rule.—These are cross-claims arising out of the same transaction,—the bankrupt in the original action, and his assignees in the present action, claiming to be paid for the timber supplied,—the defendant, on the other hand, claiming damages for the insufficient supply of timber under the contract. The bankrupt has entered into an agreement under which the two actions and all matters in difference between him and the defendant in relation to the contract are referred to arbitration. Supposing there had been no bankruptcy, and Fossey and Steel had, in violation of the agreement to refer, brought an action, the court would undoubtedly have stayed the proceedings: *Dicas v. Jay*, 4 M. & P. 285, 6 Bingh. 519 (E. C. L. R. vol. 19); *Moscatti v. Lawson*, 4 Ad. & E. 331 (E. C. L. R. vol. 31); *Russell on Awards*, 2d edit. 49, 89. The assignees take the property of the bankrupt subject to all equities which attach to it. Where a bank-

rupt had made a debt subject to a set-off, he could not convey it to his assignees free from the equity with which he had so encumbered it. In *Ex parte Michie*, *In re Geddes*, 1 Mont. D. & De G. 181, it was held, that, although an agreement of the bankrupt to submit to arbitration *656] is not binding on his assignees, yet, where *a judge's order, made (by consent) in a cause in which the bankrupt was plaintiff, recognised a pending reference between the parties, and ordered, that, in the event of any sum being found by the arbitrator to be due from the bankrupt to the defendant, such sum might be set off against the debt and costs in the action,—the order amounted to an agreement on the part of the bankrupt to allow a right of set-off to the defendant of the sum to be thus ascertained, by which the assignees were equitably bound; and, the sum not having been ascertained before the bankruptcy, it was referred to the registrar to do so; and the assignees were in the mean time restrained from proceeding in any action for the recovery of the debt. Sir George Rose there says: "The substantial justice of this case appears to me to be decidedly with the petitioner. There is no question but that assignees are not bound by a mere agreement of the bankrupt to refer to arbitration. But this order is something more. It is a deliberate contract, one part of which, indeed, acknowledges a reference then pending; but the substantive part of the contract is, that, in the event of the arbitrator awarding any sum of money to be paid by the bankrupt to the petitioner, such sum might be set off against the debt due to the bankrupt. There is no doubt that the bankrupt was bound by this contract; *and that the assignees are also equitably bound by it.*" So, here, the bankrupt has subjected his debt to a deduction by the arbitrator in respect of the defendant's cross-claim. The assignees have no right to separate the claim from the counter-claim. In *Dobson v. Lockhart*, 5 T. R. 133, A. became bound as surety for B., who, in order to indemnify him, agreed that he should retain out of any money that should be due to him from B. in respect of any dealings between them in trade, so much as he should pay on the bond: B. afterwards sold goods to A. of a less value than the *657] money *secured by the bond, and then became bankrupt, and A. was obliged to satisfy the bond: and it was held, that the assignees of B. could not recover in an action for goods sold and delivered, there being nothing due to the bankrupt's estate on the original contract. [JERVIS, C. J.—That was a case of mutual credit. Here, you are seeking to get under the reference that which you could not get under the bankruptcy.] It would work injustice to the bankrupts, as well as to Walker, to allow the present action to go on; for, they would not be discharged in respect of Walker's claim. The case of *Sturges v. Lord Curzon*, 7 Exch. 17,† is clearly distinguishable: there was no reference there of matters in difference; no cross-action: there were no interests involved there which would be sacrificed by

allowing the action to proceed. Assignees, though not bound to adopt a reference, are yet bound by the award if they elect to go on under it: *Dod v. Herring*, 1 Russ. & M. 158. The language of s. 11 is abundantly sufficient to embrace this case.

JERVIS, C. J.—I am of opinion that this rule must be discharged. I very much doubt, that, even if so inclined, the court has the power to make the rule absolute, and I think, that, by making the 11th section of the 17 & 18 Vict. c. 125, applicable to mutual credits, we should be giving it an effect which the legislature never contemplated, and altering the course of proceedings in bankruptcy. But it is unnecessary to decide that, because the matter is in the discretion of the court, and, in the exercise of our discretion, we do not think there is any ground for this application. The case is shortly this:—The bankrupts, Fossey and Steel, having a claim against Walker for liquidated damages, and Walker having a claim against them for unliquidated damages, each brings an action against the other; and, before the bankruptcy, the two actions (one of which is at issue, and the other *advanced as far [*658 as plea] are referred, together with all matters in difference, by a judge's order. If the reference had proceeded, Walker would undoubtedly have had the benefit of a set-off. Before the reference is proceeded with, Fossey and Steel become bankrupts; the effect of which is, that their assignees are entitled to recover against Walker the debt due from him to the estate, and Walker will be entitled to prove under the fiat in respect of any claim which he can establish. [*Monk* suggested that Walker would have no such right.] If he cannot, the case is so much the stronger; for, the consequence is, that Walker is seeking by this application to compel the assignees to go on with the reference, in order that he may thereby obtain an advantage to which he is not entitled, and which he can only obtain by our interfering to stay the proceedings in this action. I do not think that is a case to which the statute was intended to apply: and, if the statute gave us power to interfere, I do not think it a case in which we could properly exercise our discretion in favour of the application. On that simple ground, I think the rule should be discharged.

CRESSWELL, J.—I am of the same opinion. I think it is impossible to distinguish the case of *Sturges v. Lord Curzon*, 7 Exch. 17,† in principle from the present. That was a case of insolvency; but it stands upon precisely the same footing in this respect as bankruptcy. Here is no positive agreement to set off one sum against another; but simply an agreement to submit to the judgment of an arbitrator what shall be done with reference to the conflicting claims. The assignees are not to be deprived of their privilege of repudiating the arrangement of the bankrupt in this case more than in that. The observation there made by Alderson, B., that “the insolvency of the party is a misfortune against

*659] the consequences of which the defendant has no remedy," *is equally applicable here. No person is responsible for the failure of the agreement of reference. If, on the one hand, it is a hardship that the defendant should be deprived of a set-off, and compelled to pay the full amount of the claim against him without regard to any counter-claim he might have had against Fossey and Steel for any imperfect performance of the contract on their part, it would be equally hard, on the other hand, if the creditors were not to have a division of the bankrupt's property irrespective of the claim of the defendant to unliquidated damages which he is not entitled to assert against the assignees.

WILLIAMS, J.—I am of the same opinion. Before their bankruptcy, Fossey and Steel and the defendant arranged to submit certain claims which each had against the other to a particular course of decision. Before that arrangement was carried out, intervening rights under the bankruptcy of the former spring up, and the state of things becomes altered. I cannot think that the 11th section of the Common Law Procedure Act, 1854, was intended to apply to such a case, or that we can in the exercise of our discretion do that which this rule asks us to do.

WILLES, J.—I am of the same opinion. *Ex parte Michie*, 1 Mont. D. & De G. 181, was a very different case from this. There, the parties agreed to settle an action upon the terms, not that the matters in difference should be referred, but that such sum of money as should be found due by the arbitrator on a pending reference might be set off against the debt and costs in the action; and the assignees were held to be equitably bound by that agreement. Rule discharged.

660] *FOUNTAIN v. CHAMBERLAIN. June 12.

Practice. Motion to strike out embarrassing pleas.

THIS was an action for an alleged nuisance in making and keeping on the defendant's land adjoining to the plaintiff's land, a tank for liquid manure, containing matters offensive and injurious to health. The action was originally brought on the 1st of April; but the declaration had been amended under a judge's order, by making it the 19th of April.

The defendant pleaded, except as to alleged grievances committed by him before the 15th of April, not guilty, and paid into court 40s. in respect of the grievances before that date.

Couch now moved for a rule to show cause why these pleas should not be struck out or amended. He submitted that it was not competent to the defendant thus to tie the plaintiff down to take an issue on matters arising between the 15th and the 19th of April. [JERVIS, C. J.—These pleas do not tie you down at all.] The plaintiff cannot safely take issue on the sufficiency of the sum paid into court.

WILLES, J.—Suppose the defendant came on the land, the nuisance being there, and quitted and conveyed away his interest in it on the 15th of April, how otherwise could he have pleaded, to get judgment on the whole record?

JERVIS, C. J.—We cannot relieve you.

Rule refused.

*Ex parte THOMAS MAKINSON. *June 12.* [*661

An attorney was readmitted, although the rule of Hilary Term, 1853, which requires a copy of the affidavit on which the application is founded, to be left at the chambers of the Chief Justice of the Court of Queen's Bench, had not been complied with.

In January, 1852, Mr. Makinson was struck off the rolls of the courts of common law and of chancery, upon his own application, for the purpose of being called to the bar. Having entered himself of Lincoln's Inn, and kept his terms for some time, he abandoned his design of going to the bar, and became desirous of renewing his practice as an attorney. He accordingly obtained a rule of this court for his readmission; but, it appearing that the copy affidavit of his intention to apply for readmission had by mistake been filed at the Chambers of the Lord Chief Justice of this court instead of at those of the Chief Justice of the Court of Queen's Bench, as required by the rules of Hilary Term, 1853, the officer declined to draw up the rule.

Application was afterwards made to Martin, B., at Chambers, upon an affidavit setting forth these facts, and stating that "the object of the rule has been attained, Mr. Maugham, the secretary of the Law Institution, having informed the deponent that the said copy affidavit was duly received by him, and that it was referred to the council, who had no cause to show."

The learned Baron thereupon made an order "that the clerk of the rules of the Court of Common Pleas do draw up a rule to readmit Thomas Makinson an attorney, notwithstanding the irregularity in leaving a copy affidavit at the Chambers of the Chief Justice of the Common Pleas instead of the Chambers of the Chief Justice of the Queen's Bench."

Rule accordingly.

*THOMAS and Another v. CLARK. *June 7.* [*662

A transferee of shares in a coal-mine, the rules of which require transfers to be registered, in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transaction is registered.

A agreed to accept a transfer of shares (in trust) from B. with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without (as the jury found) A.'s authority registered the transfer:—Held, that this unauthorized registration did not render A. liable as a partner for debts of the company.

THIS was an action for money payable by the defendant to the plain-

tiffs for goods bargained and sold and goods sold and delivered by the plaintiffs to the defendant, at his request, and for work and materials provided by the plaintiffs for the defendant, at his request, and for money paid by the plaintiffs for the defendant, at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them; and the plaintiffs claimed 110*l*.

Pleas, never indebted, and payment.

The cause was tried before Williams, J., at the first sitting in London in Easter Term last. The facts which appeared in evidence were as follows:—The plaintiffs are mining-engineers carrying on business at the Union Works, Carnarvon. The action was brought to recover a sum of 102*l*. 19*s*. 7*d*. for goods sold to and work done by them for a mining company in Wales formed on the cost-book principle, called the Cwmdyle Rock and Green Lake Copper Mining Company, between the 20th of February and the 24th of November, 1855.

In order to show the defendant to be a partner or shareholder in the company, the secretary or purser was called. He produced the cost-book, in which was registered a transfer of 363 shares in the mine from one Lutwyche to the defendant. The transfer which was produced, and which bore a 30*s*. stamp dated August 18, 1855, was in the following form:—

“To the directors of the Cwmdyle Rock and Green Lake Copper Mining Company.

*668] “I, John Lutwyche, of East Moulsey, Surrey, in *consideration of the sum of 299*l*. 10*s*. paid to me by George Clark, of 68 Oakley Square, St. Pancras, do hereby bargain, sell, assign, and transfer to the said George Clark 363 shares of and in the undertaking called the Cwmdyle Rock and Green Lake Copper Mining Company, To hold unto the said George Clark, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution thereof. And I the said George Clark do hereby agree to accept and take the said 363 shares, subject to the conditions aforesaid. As witness our hands and seals the 30th day of June, 1855.

“Signed, sealed, &c.

“JOHN LUTWYCHE.

“GEORGE CLARK.”

The purser stated that the transfer was registered before the 26th of October, 1855; *that it was brought to him for that purpose by Lutwyche*, who stated that it was a bonâ fide transfer, and that he was acting as the agent of Clark in respect of the shares, and requested that notices of meetings, &c., might be sent to him; and that they were accordingly so sent: and he further stated, that, by the rules of the company, registration was necessary to entitle the transferee to be treated as a partner or shareholder. It did not appear that any notice of the registration of the transfer had been given to the defendant: but, in the month of December, 1855, he received the following circular from the secretary:—

"Cwmddyle Rock and Green Lake Copper Mining Company.

"7, Tokenhouse Yard, Lothbury, October 29, 1855.

"Sir,—I am instructed by the committee to inform you, that, at a special meeting of the adventurers in the above company, held the 26th instant, the following accounts were approved and passed.

[Here followed a statement of the accounts of the mine from the 31st of July to the 30th of September, 1855.]

"The following resolutions were passed:—

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"That the resignation of Captain Colliver be accepted.

"That all mining be for the present suspended, and the working for the winter confined to the dressing of the ore now at surface for the market.

"That John Hawke, the surface agent, be appointed to undertake the management of this operation, in accordance with the plan detailed by him to the meeting.

"That a call of 2s. 6d. per share be made; 1s. 3d. payable on the 5th November, and 1s. 3d. on the 26th.

"That a vote of thanks be given to the chairman and committee of management.'

"As you appear by the books of the company to be the registered owner of 363 shares, you are requested to pay the following amount to me at the above office,—363 shares, name of Mr. Clark, 2s. 6d. call per share, 45l. 7s. 6d.

"W. CURTIS, Secretary."

Upon receipt of this letter, the defendant called on Curtis, and at once repudiated his liability as a shareholder.

Amongst other rules of the company were the following:—

"26. That no shareholder shall sell or dispose of shares without giving notice to the purser or secretary, such notice to be given or left at the offices of the company, and to contain the name and address in full of the party to whom such shares are transferred, as well as the name and address of the party transferring the same; and that any such instrument of transfer shall be according to a printed form to be provided for that purpose by the committee; and which may be had on application to the purser, &c.

"27. Shareholders may determine their responsibility or liabilities in the company, by giving notice in writing *to the purser or secretary of his or her desire to retire from the company, and paying [*665 up his or her proportion of costs and liabilities, and also depositing the transfers."

The defendant proved, that, in the early part of June, 1855, Lutwyche, with whom he was on terms of friendly intercourse, informed him that he purposed being absent from England for some time, and requested him to hold for him certain shares in the Commercial Bank of London, and the 363 shares (now in question) in the Cwmddyle Rock and Green Lake Copper Mining Company. The defendant consented to do so; and

transfers were accordingly prepared for the purpose, and executed by both parties; Lutwyche at the same time handing to the defendant a letter in the following terms:—

“London, June 11, 1855.

“George Clark, Esq.

“Dear Sir,—I hereby acknowledge that the 368 shares in the Cwmdyle Rock and Green Lake Copper Mining Company, which I have this day sold and transferred to you for the sole purpose of being held in trust for me, are taken by you with the express understanding that you are not to be responsible for the payment of any future calls that might be made for the same.

“I remain, dear Sir, yours faithfully,

“JOHN LUTWYCHE.”

The defendant swore that no money passed between himself and Lutwyche on the occasion, but that he merely consented to hold the shares in trust for Lutwyche, and for the purpose of representing him, and with an understanding that the transfer was to be registered only in the event of Lutwyche going abroad; and that the Commercial Bank shares, which were transferred to him for the same purpose, were afterwards retransferred by him to Lutwyche, who did not go abroad as he had intended.

*666] There was, however, no evidence that this *arrangement had been communicated either to the secretary of the company or to the plaintiffs.

On the part of the defendant, it was urged, that there was no evidence that the defendant was a partner or shareholder in the concern, inasmuch as the rules of the company required all transfers to be registered, and the defendant never had authorized the registration of the transfer of the shares in question to him, and never received notice of the transfer until he was informed by the secretary's circular of the 29th of October, 1855, that a call had been made upon him in respect of the shares.

The learned judge yielded to the objection so far as regarded the goods supplied prior to the date of the registration of the transfer, viz. the 26th of October, 1855: and, as to the residue of the demand, he left it to the jury to say whether Lutwyche had any authority from the defendant to register the transfer. The jury found he had not; whereupon the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for 30*l.* 7*s.* 9*d.*, the value of the goods supplied to the company subsequently to the registration of the transfer from Lutwyche to the defendant.

Archibald, in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiffs for 30*l.* 7*s.* 9*d.*, “on the ground that the defendant was liable as a partner in the Cwmdyle Rock and Green Lake

Copper Mining Company, from the 26th of October, 1855, the time when the transfer of shares to him in the said Company was registered." He admitted that registration of the transfer was necessary to constitute the transferee a partner in the mine; but submitted that neither the company nor third persons, creditors of the company, could be bound by secret arrangements entered *into between the transferor and transferee at the time of the execution of the transfer. He [*667 referred to a Cornish stannary case, of *Tippet v. Johns*, *Tapping's Cost Book*, 2d edit. p. 187.

Collier and *Wordsworth* now showed cause.—The proof of the defendant's being a shareholder in the mine altogether failed. There was no evidence that he ever exercised the rights of a partner, or ever in any way held himself out as such; and the jury expressly found that he never authorized Lutwyche to register the transfer of the shares in question to him. Although the defendant signed the deed of transfer as accepting the shares, it was competent to him to show, that, by the assent of both parties, it was not to operate as a transfer, except in an event which never happened, viz. Lutwyche's going abroad. Upon this subject, the recent case of *Pim v. Campbell*, 27 *Law Times*, 122, is precisely in point. That was an action upon a written agreement signed by the defendant, for the purchase of a share in a patent crushing machine. At the trial, it appeared, that, after some negotiation between the plaintiff, the defendant, and several other persons, respecting the purchase of the machine, an agreement was prepared and signed by the defendant at a meeting of all the parties, and that at the foot of the agreement there was written the following memorandum, which was signed by the plaintiff:—"With reference to the above agreement, and in consideration of 5*l.* paid to me, I agree to execute within two days the necessary legal documents to complete the titles to the shares." On the part of the defendant, evidence was offered, to show, that, although the document in question was signed at that meeting for convenience sake, it was so signed upon the express understanding that it should not operate as an agreement unless a Mr. Abernethy should approve of the machine; and that Abernethy *afterwards saw the machine, and [*668 disapproved of it. This evidence was objected to, on the ground that it was an attempt to vary by parol the contents of a written agreement. The learned judge (Lord Campbell), however, received it; and he left it to the jury to say whether it was agreed between the parties that the document so signed should not operate as an agreement until Mr. Abernethy had approved of the machine, and whether the document was signed upon that understanding,—telling them that it was incumbent on the defendant to make out such a case by very clear and satisfactory evidence. The jury answered the question in the affirmative, and returned a verdict for the defendant. A rule was obtained for a new trial, on the ground that the evidence had been improperly received,

and afterwards discharged; on which occasion, Erle, J., said: "The ground upon which the plaintiff rests, is, that an agreement, having been come to and reduced to writing, cannot be varied by parol evidence; but, upon the facts, I think that there was no agreement here; but only a paper containing certain terms and the signatures of the parties. Such a document affords a very strong presumption indeed of an agreement; and, if the jury had found that it was signed *animo contrahendi*, it is clear that no evidence would have been admissible to vary or alter it. But here the matter is taken up one step higher; for, the jury have found that the defendant expressly said, that, though he put his name to the instrument, he did not then agree to the terms of it. I grant the danger of allowing such evidence; and I think, that, upon all occasions when such a case is set up, the jury should be told to look at the evidence with scrupulous suspicion: but it is possible to be a true case; and, when it is true, then the plaintiff is endeavouring to fasten upon the defendant as an agreement that which was never in fact intended to be one." Crompton, J., expressed himself in similar terms: and Lord *669] Campbell *said: "The general rule is well settled; but it does not apply to this case, because it was proved by overwhelming evidence that the defendant and the two other persons who signed the document expressly declared, that, though for convenience sake they signed it then, it was not to operate as an agreement until Mr. Abernethy had approved, *and to that the plaintiff assented.*" A similar principle is laid down in *Bell v. Lord Ingestrie*, 12 Q. B. 317, where it was held, that, under a plea traversing the endorsement of a bill of exchange, evidence that the alleged endorser wrote his name on the bill, and delivered it to the alleged endorsee, for the express purpose of retiring other bills, and on the express condition that they should be retired forthwith, and that such condition had not been complied with, was admissible in support of a plea traversing the endorsement. Patterson, J., there says: "I think this case is within the principle of *Marston v. Allen*, 8 M. & W. 494,† and *Adams v. Jones*, 12 Ad. & E. 455, 4 P. & D. 174. The facts here are of a different character in some respects; for, in those cases, it was not intended that the transferee should ever take any interest in the bills. But I think that makes no difference; for, here it was not intended that the transferees should take any interest until the old bills were returned; and, until that time, it is the same thing, in principle, as if it had been intended that no interest should pass at any time. The bills were received on terms which were not satisfied; and there was no endorsement." So, here, if the transfer was never intended to be operative, or was intended to operate only in an event which never happened, it is clear that Clark did not by signing it authorize its registration. If the transfer was not operative as between Clark and Lutwyche, the company could not make it so by registering it. There was no evidence of consent or authority, and no evi-

dence of subsequent ratification by Clark. The rules of the company, which were put in, *required that all calls should be paid before a shareholder could be allowed to transfer; and there was no evidence that the calls upon these shares had been paid. [*670]

Byles, Serjt., and *Archibald*, in support of the rule.—The case of *Pim v. Campbell* may be very good law; but the concluding observation of Lord Campbell shows that it can have no application here. It is something analogous to the old doctrine of escrow. [CRESSWELL, J.—The evidence which was allowed to be introduced, made that conditional which on the face of it purported to be absolute.] This is a document under seal. It is not delivered as an escrow. Neither the letter nor the parol agreement adds anything to the deed, which imports an absolute transfer of the shares to the defendant, who thereby becomes a dry trustee of them. [WILLIAMS, J.—Not so. The shares do not pass without registration.] The question is not as to the defendant's rights as between him and Lutwyche. The case resembles somewhat that of *Hickman v. Cox*, ante, p. 617. It was not contended there that the defendants were not liable, on the ground that they had a mere dry legal interest. The rules of the company do not say that the transferee shall not be a partner until the transfer is registered. [CRESSWELL, J.—Your witness swore that registration was necessary to constitute a man a shareholder in the concern.] His statement of his opinion cannot contravene the law. The company have a right to call on the transferee to be registered: that is all. So, again, the rule requiring a previous payment of calls, is a mere provision affecting the company; but it in no degree varies the rights of the parties. [WILLIAMS, J.—Suppose a call becomes due between the date of the transfer and the time of registration, who would be liable?] The person whose name appeared on the register. In *Bentley v. Bates*, 4 Jurist, 552, a mortgagee (not an absolute assignee) of a share in *a colliery was held entitled to an account of profits. That case [*671] shows that Clarke would be entitled to an account of the profits of this concern without registration. But, assuming registration necessary to make the transferee a partner, the delivery of the transfer to Lutwyche was a sufficient authority to him to register it. An authority once given cannot be affected by a subsequent secret revocation. In *Montague v. Perkins*, 22 Law Journ. C. P. 187, the defendant, in 1840, gave S., for value, his acceptance in blank, on a 5s. stamp. S., in 1852, and, as the jury found, not within a reasonable time, filled in his own name as drawer, for 200l., at five months. The defendant, being sued on the bill by an innocent endorsee for value, pleaded, first, that he did not accept, secondly, the statute of limitations; and it was held that the plaintiff was entitled to the verdict on both issues, notwithstanding the finding of the jury. [CRESSWELL, J.—This is a very different case. Here, the creditors did not act upon the faith of Clark being registered

as a shareholder.] If any fraud has been practised upon the defendant, the plaintiffs are not responsible for it: *Ellis v. Schmæck*, 5 Bingh. 521 (E. C. L. R. vol. 15), 8 M. & P. 220.

CRESSWELL, J.(a)—I am of opinion that this rule must be discharged. This is an action against the defendant, charging him as a member or partner in a cost-book mining company, on a contract made with the company. To entitle them to succeed, the plaintiffs must make out that the defendant is a member of the company, or has allowed himself to be held out as a member, so that credit may be said to have been given to him. Now, every partnership has a right to make its own regulations as to the mode of transferring shares or interests therein. Here, it was proved expressly that a formal instrument of transfer, according to the *672] rules which regulate this company, is not effectual to transfer an interest in the concern to the transferee, until the transfer has been duly registered by the secretary or purser. Therefore, until such registration takes place, the transferee takes no benefit and incurs no liability as a partner. It appears, that, contemporaneously with the execution of the transfer, a letter was addressed by Lutwyche, the transferor, to the defendant, the transferee, showing the terms and the purpose for which the transfer was made. And, even supposing that that gave Lutwyche authority to register, the authority was revoked long before the registration actually took place. That the transaction was secret makes no difference: for, if the transfer was secret, the authority to register was secret also. The registration was unauthorized. If the credit had been given on the faith of the defendant's being registered as a shareholder, possibly he might have been liable, on the ground of his having put it in the power of Lutwyche to place him in that position. But the evidence failed to establish a case of that sort. I therefore think there is no ground for entering the verdict as prayed.

WILLIAMS, J., and WILLES, J., concurred.

Rule discharged.

(a) *Jervis, C. J., was absent.*

***ROLT v. COZENS. May 28.**

[*678]

The declaration stated, that, by an agreement made between the plaintiff and W. and D., it was agreed, that, in consideration of the plaintiff agreeing to supply one F. with timber to the value of 200*l.*, the said W. and D. severally agreed to guaranty to the plaintiff the due payment of any amount for such timber not exceeding 200*l.*, within six months from the date of the sale of the said timber; that, in pursuance of such agreement, the plaintiff supplied timber to the amount of 153*l.* 10*s.* 1*d.* to F.; that afterwards, and whilst the said timber was unpaid for, and before the period of six months from the date of the sale had elapsed, the plaintiff became dissatisfied with such guarantee so given by W. and D.; and thereupon by another agreement between the plaintiff and the defendant, after reciting the said guarantee, that the plaintiff had delivered timber to the value of 153*l.* 10*s.* 1*d.*, and that the plaintiff was not satisfied with such guarantee, the defendant, at the request of W. and D., in consideration of the premises, and of the plaintiff forbearing to take any proceedings against W. and D., guaranteed to the plaintiff payment of the said sum of 153*l.* 10*s.* 1*d.* on the 13th of December then next. Breach, that, although the plaintiff had done all things on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, the defendant had not paid the same, or any part thereof.

Fourth plea,—that the plaintiff had not done everything on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, inasmuch as he the plaintiff did not forbear to take the said proceedings in the declaration mentioned against the said W. and D., but, on the contrary, took such proceedings before the said 13th of December next after the making of the said alleged agreement:—

Held, on motion in arrest of judgment, that the plaintiff's forbearance to sue W. and D. before the day named, was a condition precedent to his right of action against the defendant on the guarantee.

Semble, that the guarantee imported a forbearance to sue W. and D. until the 13th of December next after its date.

THIS was an action upon a guarantee. The declaration stated, that, before the making of the promise by the defendant thereafter mentioned, by a certain agreement made and entered into by and between the plaintiff and certain persons named Burlington Benjamin Wale and George Dawe, it was agreed by and between the plaintiff and the said B. B. Wale and G. Dawe, that, in consideration of the plaintiff by the said agreement agreeing to supply one William Fowler with timber and deals to the value of 200*l.*, the said B. B. Wale and G. Dawe severally agreed to guaranty to the plaintiff the due payment of any amount for such timber not exceeding the sum of 200*l.*, within six months from the date of the sale of the said timber; [and the plaintiff said that the making of the said agreement by the plaintiff was procured and obtained by the said William Fowler and by the said B. B. Wale and G. *Dawe by means of certain fraudulent representations by them made to the plaintiff;(a)] and that, in pursuance of such agree- [*674
ment, he, the plaintiff, did supply timber to the amount of 153*l.* 10*s.* 1*d.* to the said William Fowler: Averment, that afterwards, and whilst such timber was unpaid for, and before the period of six months from the date of the sale of the said timber had elapsed, the plaintiff became [aware of the said fraud,] and was dissatisfied with such guarantee so given by the said B. B. Wale and G. Dawe; and thereupon, by another agreement made and entered into by and between the plaintiff and the

(a) The words within brackets were struck out on amendment.

defendant, after reciting the said guarantee, and that the plaintiff had delivered timber to the amount of 153*l.* 10*s.* 1*d.*, and that the plaintiff was not satisfied with such guarantee, the defendant, at the request of the said B. B. Wale and G. Dawe, in consideration of the premises, *and of the plaintiff's forbearing to take any proceedings against the said B. B. Wale and G. Dawe* [in respect of such fraudulent representations], guarantied to the plaintiff payment of the said sum of 153*l.* 10*s.* 1*d.* on the 18th day of December then next, which day elapsed before the commencement of this suit: and it was by the said agreement further agreed by the defendant that his guarantee should not be prejudiced by the plaintiff's refusing to deliver, and not delivering, the remainder of the said timber: and the plaintiff said, that he had never been paid for the said timber, or any part thereof, by any of the said parties, or at all; yet, although he had done all things on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, the defendant had not paid the same, or any part thereof, to the plaintiff's damage of 200*l.*

The defendant pleaded,—first, that it was not agreed between the plaintiff and the said B. B. Wale and G. Dawe as in the declaration *675] alleged,—secondly, that the *making of the said agreement by the plaintiff was not procured or obtained by the said William Fowler and the said B. B. Wale and G. Dawe by means of the said fraudulent representation as alleged,—thirdly, that the defendant did not guaranty to the plaintiff the payment of the said sum of 153*l.* 10*s.* 1*d.*, as or on the terms in that behalf alleged,—fourthly, that the plaintiff had not done everything on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.* inasmuch as he *the plaintiff did not forbear to take the said proceedings in the declaration mentioned against the said B. B. Wale and G. Dawe, but, on the contrary, took such proceedings before the said 18th day of December next after the making of the said alleged agreement.*

The plaintiff took issue upon each of these pleas.

The cause was tried before Alderson, B., at the last Spring Assizes for Surrey. The substantial facts of the case were as follows:—The plaintiff, who was a timber-merchant, carrying on business at Rotherhithe under the firm of Brockelbank & Rolt, had supplied certain timber to one William Fowler upon the guarantee of two persons named Burlington Benjamin Wale and George Dawe, who were directors of a building society called The Unity Permanent Building and Investment Society. That guarantee was in these terms:—

“In consideration of Messrs. Thomas Brockelbank and Peter Rolt, of Acorn Wharf, Rotherhithe, timber-merchants, hereby agreeing to supply Mr. William Fowler, of, &c., builder, with timber and deals to the value of 200*l.*, we hereby severally agree to guaranty to them the said Thomas Brockelbank and Peter Rolt the due payment of any amount

not exceeding the before-mentioned sum of 200*l.*, within six months from the dates of sale of the goods. Dated this 18th day of June, 1854.

"BURLINGTON B. WALE.

"GEORGE DAWE."

*Between the 14th and the 20th of June, the plaintiff, on the faith of this guarantee, sold and delivered timber to Fowler to the amount of 153*l.* 10*s.* 1*d.* Being, however, dissatisfied with the security, the plaintiff declined to supply any more timber, and, after some negotiation, a further security was given by the present defendant, in the following terms:—

"Memorandum of agreement made this 22d day of July, 1854, between Peter Rolt, of Clement's Lane, timber-merchant, trading under the style or firm of Thomas Brockelbank & Rolt, of the one part, and Thomas James Cozens, of, &c., of the other part: Whereas, on the 18th of June, 1854, B. B. Wale and G. Dawe, in consideration of the said Peter Rolt agreeing to supply William Fowler with timber to the value of 200*l.*, severally agreed and guaranteed to the said Peter Rolt the said amount; and the said Peter Rolt has accordingly delivered timber to the amount of 153*l.* 10*s.* 1*d.*, and is not satisfied with such guarantee; and accordingly the said Thomas James Cozens, at the request of the said B. B. Wale and G. Dawe, has and does hereby agree, *in consideration of the said Peter Rolt forbearing to take any proceedings against the said B. B. Wale and G. Dawe*, to guaranty the payment of the said sum of 153*l.* 10*s.* 1*d.* on the 18th day of December next. This guarantee not to be prejudiced by the said Peter Rolt refusing and not delivering the remainder of the timber. As witness the hands of the parties.

"THOMAS JAMES COZENS."

On the 9th of December, 1854, writs were issued against Wale and Dawe at the suit of the present plaintiff, and served before the 13th; but the actions were discontinued on the 30th. This action was commenced on the 19th.

For the defendant it was insisted that the plaintiff had not performed the condition upon which the *guarantee was to attach, inasmuch as he had commenced proceedings against Wale and Dawe before the 13th of December, 1854.

On the other hand it was submitted, that the guarantee was satisfied by a forbearance for a reasonable time; and that, assuming the true construction of the instrument to be that the plaintiff was to forbear to sue Wale and Dawe until the 13th of December, still there had not been a total failure of consideration, and therefore the plaintiff was entitled to recover on the guarantee, though possibly he might be liable to a cross action.

The learned judge allowed the declaration to be amended by striking out the words within brackets, which rendered the second plea immaterial,—on payment of all the costs occasioned thereby and by the amend-

ment of the declaration; and he directed a verdict to be entered for the defendant on the fourth plea, and for the plaintiff on the first and third, reserving leave to the plaintiff to move to enter judgment non obstante veredicto on the fourth plea for the sum of 153*l.* 10*s.* 1*d.*

Bovill, in Easter Term last, in pursuance of the leave reserved, obtained a rule nisi to enter judgment for the plaintiff on the fourth issue for 153*l.* 10*s.* 1*d.*, notwithstanding the verdict found for the defendant on such issue, on the ground that the fourth plea was no answer to the action; or for a new trial, on the ground that the mere issuing of a writ before the 13th of December did not discharge the defendant from his guarantee, or support the said plea. He referred to the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 b, 320 c, and to *Stavers v. Curling*, 3 N. C. 355, 3 Scott, 740. [*CRESSWELL, J.*, suggested that it might be that the real consideration for the defendant's guarantee was, the discharge *678] of *Wale and Dawe* from their responsibility, and that, if *they were not discharged, that might go to the whole consideration.]

Garth now showed cause.—The only ground of the motion for a new trial is, that the mere issuing of a writ against *Wale and Dawe*, and serving it, before the 13th of December, would not support the fourth plea. By the guarantee, however, the plaintiff undertakes not to sue them before the day mentioned; and that undertaking was the consideration for the defendant's promise. The evidence, therefore, that the plaintiff did not forbear to sue them clearly sustains the plea. Then, as to the motion for judgment non obstante veredicto, it is said that the forbearing to take proceedings against *Wale and Dawe* before the 13th of December was not a condition precedent to the plaintiff's right to sue on the guarantee; and reliance is placed on the 3d rule in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320 c; and it is contended that the word "forbearing" means "agreeing to forbear;" and that, as the agreement to forbear might be an independent covenant on the one side, so the defendant's promise to pay the debt on the 13th of December was an independent covenant or promise on the other, and neither was a condition precedent, but each matter for a separate action. The proper construction of the guarantee, however, it is submitted, is, that, in consideration that the plaintiff would forbear to take any proceedings against *Wale and Dawe until the 13th of December then next*, the defendant guaranteed payment (that is, promised to pay) of the sum of 153*l.* 10*s.* 1*d.* on that day. The second guarantee is alleged to have been given at the request of *Wale and Dawe*. The only consideration for the defendant's promise, is, the plaintiff's actually forbearing. The declaration sets out the instrument according to its legal effect: the plaintiff now, for the purpose of this motion, asks *679] the court to put a different construction upon it. [*WILLIAMS, J.*—For the purpose of this part of the rule, all that we can look at is, the guarantee as set out upon the record.] Whatever proceedings

the declaration means, the fourth plea avers that the plaintiff "took *such* proceedings before the said 13th of December next after the making of the said alleged agreement." According to the argument on the other side, forbearance for a week, or a day, would satisfy the condition. That clearly cannot be so. In *May v. Alvares*, Cro. Eliz. 387, the plaintiff declared in assumpsit, "whereas the defendant was possessed de diversis bonis of the plaintiff, that the defendant, in consideration the plaintiff would forbear the goods, promised to deliver them within six months, and alleged in fact that he did forbear them for six months, and that the defendant had not yet delivered them:" it was moved in arrest of judgment, "that there was not any consideration, for it is that he should forbear, and he doth not show for what time, which is not any consideration; for so he might forbear but for a quarter of an hour; and, although it be alleged that he [did] forbear for six months, that helps not the consideration alleged." But the court held it to be well enough; for "it is a sufficient consideration that he forbear; and he ought to show for what time he forbore it: and, when the defendant saith that he would deliver them within six months, *therein is implied that the other should forbear them for six months.*" That seems to be precisely in point. So, in *Payne v. Wilson*, 7 B. & C. 423 (E. C. L. R. vol. 14) 1 M. & R. 708 (E. C. L. R. vol. 17), the plaintiff declared in assumpsit, in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. on a cognovit, defendant promised to pay 80*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next; averring, that the plaintiff did suspend proceedings on the cognovit. The plaintiff at the trial *proved the following agreement in writing:—"The plaintiff having at my request consented to suspend proceedings against [*680 A., I do hereby, in consideration thereof, personally promise to pay 30*l.* on account of the debt on the 1st day of April now next:" and it was held, that the consideration for the promise was sufficient, because it must be taken as a consent to *suspend proceedings at least until the 1st of April*; and that, after verdict, the averment that the "plaintiff had suspended proceedings" was sufficient, without specifying for what period. *Edwards v. Roberts*, 2 Mod. 24, and *Waters v. Glassop*, 1 Lord Raym. 357, are to the same effect. At all events, if the court should incline to grant a new trial, it ought to be on payment of costs.

Bovill and *C. Pollock*, in support of the rule.—In the cases cited, no doubt, the instruments imported an agreement to forbear down to the time of the payment or the delivery of the goods. But, whether this is an agreement to forbear until the 13th of December or to forbear generally, is quite immaterial. Assuming it to be an agreement to forbear for six months, if the plaintiff did actually forbear for five months, the defendant has had the benefit of a *part* of the consideration, and may have his remedy for the breach by cross action, if any damage has

been sustained. The case falls precisely within the 8d rule in the notes to *Pordage v. Cole*, 1 Wms. Saund. 820 c., where it is laid down, that, "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. As, where A. by deed conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.* and an *681] annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy; and B. covenanted, that, A. well and truly performing all and everything therein contained on his part to be performed, he would pay the annuity: in an action by A. against B. on this covenant, the breach assigned was, the non-payment of the annuity: plea, that A. was not at the time *legally possessed of the negroes* on the plantation, and so had not a good title to convey. The Court of King's Bench on demurrer held the plea to be ill, and added, that, if such plea were allowed, any one negro not being the property of A. would bar the action: *Boon v. Eyre*, 1 H. Blac. 273 (a), 2 Sir W. Black. 1812. The *whole* consideration of the covenant on the part of B., the purchaser, to pay the money, was, the conveyance by A., the seller, to him of the *equity of redemption* of the plantation, and also the *stock of negroes* upon it. The excuse for non-payment of the money, was, that A. had broken his covenant as to *part* of the consideration, viz. the stock of negroes. But, as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment because A. had not a good title to the negroes." And, after referring to *The Duke of St. Albans v. Shore*, 1 H. Black. 279, and *Campbell v. Jones*, 6 T. R. 570, the learned author continues,—“Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that, where a person has received *a part* of the consideration for which he entered into the agreement, it would be unjust, that, because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore, the law obliges him to perform the agreement *682] on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration.” [CRESSWELL, J.—How soon do you say that the plaintiff might have taken proceedings against Wale and Dawe without losing the benefit of his guarantee? The next day?] The argument must undoubtedly go that length. [WILLIAMS, J.—The rule referred to is adopted by the Lord Chief Baron in delivering the judgment of the Court of Exchequer in *Ellen v. Topp*, 6 Exch. 441,† and by Lord

Wensleydale in giving judgment in *Graves v. Legg*, 9 Exch. 709, 716.† The last-mentioned learned judge, after reading the passage, says,—“Mr. Serjt. Williams goes on to observe that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in *Campbell v. Jones* or *Boon v. Eyre*, or by averment in pleading. When that appears, it is no longer competent to the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed than to say it was not a condition precedent.” This is rather a novel view of the matter.] It is, at all events, putting it upon an intelligible principle. The case of *Stavers v. Curling*, 3 N. C. 355 (E. C. L. R. vol. 32), 3 Scott, 740 (E. C. L. R. vol. 36), affords a good illustration of the rule. There the plaintiff, as captain of a South Sea whaler, covenanted with the defendants, the owners, that he would proceed to the fishery, and procure a cargo of sperm oil, &c., or as great a proportion as might be under all circumstances within his power to obtain, would return to London, and at his own cost deliver the cargo, would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same, and would not smuggle or trade, or permit any on board to do so: and the defendants covenanted, *on the performance of the before-mentioned terms and *conditions on the part of the plaintiff*, to pay him a certain proportion of the net proceeds of the cargo: and it was held, that [*683 the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendant's covenant. Tindal, C. J., in giving judgment,—3 N. C. 368, 3 Scott, 754 (E. C. L. R. vol. 36),—says: “The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie v. Atkinson*, 10 East, 295, to be this, ‘that, where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.’ Now, applying that distinction to the consideration of the covenant in question, we think the necessary inference is, that it was not the intention of the contracting parties that any of the covenants entered into by the plaintiff, the captain of the ship, should form a condition precedent to his right to recover on the covenant entered into by

the defendants, the shipowners, for his stipulated remuneration. Thus, for instance, if the covenant to procure a cargo of sperm oil, &c., or as great a proportion thereof as might be under all circumstances within the power of the plaintiff to obtain, be held to be a condition precedent, a very small and trifling deficiency from the best possible cargo, if *684] attributable to any the slightest carelessness on the part of the plaintiff, would occasion the total loss of all his profits of the voyage; whereas, if the breach of the covenant were made the subject of an action by the defendants, the compensation to them for such breach would correspond exactly with the extent of their injury." [WILLIAMS, J., referred to *Neale v. Ratcliff*, 15 Q. B. 916 (E. C. L. R. vol. 69). There, the plaintiff and defendants agreed, the plaintiff to let, and defendants to take, a messuage, barn, stable, and out-buildings; and the defendants agreed to keep in repair *the said messuage, buildings, and premises, the same being first put into repair by the plaintiff*. In an action of assumpsit for non-repair (the declaration alleging, that, although the plaintiff, before the breach of promise, put the said messuage, buildings, and premises into repair, yet the defendants did not keep the same in repair; to which the defendants pleaded that the plaintiff did not first put the said messuage, building, and premises into repair; and issue was taken thereon), it was proved, and found in terms by the jury, that the plaintiff had not put the whole premises into repair, but part only; and that the defendants had not kept that part in repair; and the jury gave damages for the part. It was held, that the repair by the plaintiff was a condition precedent to the obligation on the defendants to repair; and that the condition precedent could not be divided, and that the plaintiff could not recover for non-repair of any part of the premises without having first repaired the whole. JERVIS, C. J.—Is it not a question of intention in all cases? The surety might know that the rent-day of the principal is the 12th, and therefore, knowing that he will be in funds on that day, he may be content to guaranty payment on the 18th. CRESSWELL, J.—Suppose I agree, in consideration of your honouring checks to the amount of 500*l.*, to repay you the amount, and you honour checks to the amount of 300*l.*, and refuse to pay more, could you sue me on the contract?] Probably not. *685] The case of *Neale v. Ratcliffe* is not more opposed to him than *Boon v. Eyre* is in favour of the plaintiff. In the 1st rule in *Portage v. Cole*, 1 Wms. Saund. 320 *b*, it is said, that, "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the con-

sideration of the money or other act." [JERVIS, C. J.—Here is a date fixed.]

JERVIS, C. J.—I am of opinion that this rule should be discharged. The second point could only arise in the event of our holding the guarantee declared on to import a continuing forbearance; and we are of opinion that it imports only a forbearance until the 13th of December. The rule referred to therefore does not apply. As to the rest, it is conceded that the instrument is to be construed according to the intention of the parties as that is to be gathered from what appears upon the face of it: and we think the intention clearly was, that the plaintiff should forbear to sue Wale and Dawe until the 13th of December as the condition upon which alone the defendant's guarantee was to attach. The case is not to be distinguished from *Neale v. Ratcliff*.

CRESSWELL, J.—I am entirely of the same opinion; and, having so plainly intimated the grounds of that opinion in the course of the argument, I do not think it necessary to repeat them.

The rest of the court concurring,

Rule discharged.

***RIDGWAY v. THE SECURITY MUTUAL LIFE ASSURANCE SOCIETY.** *June 11.* [*686]

Affidavits of a director of a company, stating, that, on a certain day, the company discontinued to carry on its business, and was wholly insolvent, and that its funds, property, and assets were and had since continued totally exhausted, and that there were no funds, property, or assets of or belonging to the company, or any other means whatsoever from or by which the plaintiff could recover or enforce payment of the judgment-debt; and of the sheriff's officer to whom a fi. fa. against the company had been delivered for execution, stating that he went to the only place in London where the company had carried on its business, and found the place deserted, and from information and personal inspection ascertained that they had no goods or property there,—Held, sufficient to entitle the judgment-creditor to execution against a shareholder under the 7 & 8 Vict. c. 110, s. 68.

JUDGMENT having been signed against the defendants for 226*l.* 15*s.* in an action against them at the suit of the plaintiff for salary and commission due to him as secretary, and the usual notice having been given,

Montague Smith, on a former day in this term, obtained a rule calling upon one Richard Wild to show cause why execution should not issue against him on such judgment, under the 7 & 8 Vict. c. 110, ss. 66, 68. The affidavits upon which the rule was obtained were those of the plaintiff, his attorney, one of the directors of the company, of the sheriff's officer to whom a fi. fa. upon the judgment had been delivered for execution, and an affidavit of service of the notice as required by the statute. The three first-mentioned affidavits stated, in substance, that the society was instituted in the year 1854, for the purpose, among others, of granting assurances upon lives, upon the principle of mutual assurance, whereby the grantee of every policy became an assured member thereof, and entitled to all the rights and privileges, and subject

to all the liabilities which by the deed of settlement of the society, or the provisions of the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, assured members of life assurance offices are declared entitled or subject to: That the society was duly registered under the provisions of the 7 & 8 Vict. c. 110, and obtained its certificate of complete registration on *687] the 31st of December, 1854: That, by the fifth clause of the deed of settlement of the society, which had been duly approved by the registrar of joint stock companies, pursuant to the provisions of the said act, it was provided that none but the grantee of every policy, or the assignee thereof by deed, duly stamped, and registered in the books of the society as therein mentioned, so long as such policies or assurances should continue in force and the amount thereby assured should remain at risk, should be deemed to be and should be an assured member of the society, and entitled to attend all general meetings thereof, to vote at such general meetings, and to enjoy such other rights and privileges as assured members should thereby, or by the said Joint Stock Companies Registration Act, and either of them, be declared entitled to; and it was thereby declared, that, whensoever any policy should have become a claim, by reason of the death of the assured or the happening of the contingency whereupon the amount thereby secured should have become payable, the person or persons entitled to the benefit of such policy should not be considered to be an assured member or members or be entitled to be registered as such, and, if previously a member or members, should cease to be such in respect of such policy, —it being intended, that, in every such case, the right of such person or persons should be limited to claiming and giving a discharge for the sum assured, and any bonuses or additions thereto: That the sole offices or place of business in London of the said society, was, at No. 3, Charles Street, St. James's Square, and that it ceased to occupy such offices on the 18th of February last: That, on the 29th of January, 1855, a policy of assurance on his own life against railway accidents, for the sum of 1000*l.*, numbered 301, under the hands and seals of J. J. R., J. S. C., and H. S., being three of the directors of the said society, was duly *688] granted to Richard Wild, of, &c., at the annual premium of 10*s.*, *by means whereof the said Richard Wild became an assured member of the said society, and entitled to all the rights and privileges, and subject to all the liabilities belonging to such assured member:* That the said Richard Wild took an active part in the business of the said society, and was duly elected a director thereof, and attended the board of directors as a member thereof, and acted as such director on the 5th and 22d of May, 23d of June, and the 18th of August, 1855, and on the said 22d of May presided at such board as the chairman thereof; and that the said Richard Wild was well acquainted with the laws and constitution of the said society, as provided by the deed of settlement thereof, and the rights, privileges, and liabilities attaching to assured members thereof: And that, on or about the 18th of February last, and

from thence hitherto, the said society discontinued to carry on its business, and then was, and still remained, wholly insolvent, and its funds, property, and assets then were, and had since continued, totally exhausted, and there then were and now are no funds, property, or assets of or belonging to the said society, or any other means whatsoever from or by which the above-named plaintiff could recover or enforce payment of the amount of the judgment-debt recovered by him in this action.

The affidavit of the sheriff's officer stated, that, on the 2d of April, 1856, he received a writ of *fi. fa.* against the defendants at the suit of the plaintiff, endorsed to levy 22*l.* 15*s.*, besides, &c., with instructions to execute the same forthwith; that on the said writ was endorsed a memorandum that the defendants were a life assurance society, and that they resided and carried on business at No. 3 Charles Street, St. James's Square; that deponent on the same day went to the said premises, No. 3 Charles Street aforesaid, for the purpose of executing *the writ, and there saw a female, who informed him that she was the [*689 housekeeper of the said premises; that deponent then inquired of her for the offices of the aforesaid society, when she informed him (and which information he believed to be true) that the said society had quit- ted the premises, and there was then no person there belonging to it, and that she did not know where the persons connected with it were to be found; that she showed deponent the rooms which were lately occu- pied by the society, which he saw were empty; that she further informed him that there were then no goods or property of the defendants remain- ing on the premises; and that the deponent thereupon made a return of *nulla bona*.

Powell now showed cause.—The 66th section of the 7 & 8 Vict. c. 110 enables creditors of joint stock companies to enforce judgments obtained against the company by execution against the person and pro- perty of shareholders only “if due diligence shall have been used to obtain satisfaction of such judgment by execution against the property and effects of the company.” The question is, whether the affidavits upon which this motion is founded sufficiently show that the Security Mutual Life Assurance Society has no property or effects which could be made available to satisfy this judgment. It is submitted that they do not, inasmuch as they do not show that the company had no other offices at which they carried on business than those to which the writ was directed. In *King v. The Parental Endowment Assurance Company*, 25 Law Journ. Exch. 18, Parke, B., says: “The question is, whether due diligence has been used. The court can only judge of that from the facts stated on the part of the plaintiff, whose duty it is to make out a *prima facie* case, the fact of whether due diligence has been used neces- sarily being within his own *knowledge. He must show that all [*690 reasonable pains have been taken to obtain satisfaction from the company. Here, a writ of *fi. fa.* was issued, but it does not appear what

steps were taken by the sheriff's officer to obtain satisfaction by that writ. The return of nulla bona may have been at the instance of the execution-creditor himself. I therefore think the affidavits are not *prima facie* sufficient to satisfy the court that all has been done that might have been done, and consequently that due diligence has not been shown. With reference to the case of *Thompson v. The Universal Salvage Company*, 3 Exch. 810,† it may be observed, that the question of the sufficiency of the affidavit was not argued at the time, or probably the court would have discharged the rule on that ground."

Per Curiam.—The affidavits, we think, are abundantly sufficient to show that due diligence has been used, and that no amount of diligence would enable the plaintiff to obtain satisfaction of his judgment against the property of the company.

Rule absolute.

*691] *GRIBBLE v. BUCHANAN. June 11.

Where, by the order, the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side.

Therefore, where a cause and all matters in difference were referred, the costs of the cause to abide the event of the action, and the costs of the reference and award to abide the event of the award, and the arbitrator found all the issues in favour of the plaintiff, and that he was entitled to recover in the action 80*l.* 14*s.* 11*d.*, and, as to the matters in difference, that there was due from the plaintiff to the defendant 6*l.*, and directed that the defendant should within ten days pay the balance to the plaintiff:—Held, that neither party was entitled to the costs of the reference and award.

An order was obtained by the plaintiff for a reference to the master under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); but the master declining to take it, the plaintiff obtained an order to rescind the former order, and proceed to trial:—Held, that the plaintiff was not entitled to the costs of these proceedings as costs in the cause.

By a judge's order, bearing date the 5th of December last, this cause and all matters in difference between the parties were referred to two arbitrators, and to such persons as they should appoint, in case they could not agree,—the costs of the cause to abide the event of the action, and the costs of the reference and award to abide the event of the award.

The arbitrators, on the 19th of January last, made their award as follows:—

"As to the said action, we find all the issues therein joined between the said parties for the plaintiff; and we further find, that the plaintiff in such action was and is entitled to recover from the defendant in such action the sum of 80*l.* 14*s.* 11*d.* And, as to the matters in difference between the said parties other than those in the said action, we find and award that there was and is due and owing from the plaintiff to the defendant the sum of 6*l.*: and, further, as to four tierces of beef and four casks of pork which were left by the plaintiff in the possession of the firm of F. de Sousa, Cammiade & Co., of Madras, for the purpose of being sold, we find and award that they, or the proceeds which may

have been, or hereafter may be, derived from the sale thereof, were and are the sole property of the defendant: And, lastly, we award, order, and direct that the said defendant shall *and do pay to the plaintiff the sum of 74*l.* 14*s.* 11*d.*, being the balance after deducting [*692 from the said sum of 80*l.* 14*s.* 11*d.* the said sum of 6*l.*, within ten days from the date of this our award."

On the taxation of the plaintiff's costs, it was objected on the part of the defendant, that the award, as to the matters in difference other than those in the action, was in favour of the defendant, according to the terms of the award, and therefore the plaintiff was not entitled either to costs of the reference or costs of the award. On the part of the plaintiff it was submitted, that, as the arbitrators, after adjusting all matters and claims referred to them, had awarded an ascertained balance to be paid to the plaintiff by the defendant, the event was in favour of the plaintiff, and he was therefore entitled to the costs of the reference and award.

The master, yielding to the objection, disallowed the plaintiff's costs of the reference and award.

Prior to the order of the 5th of December last, the plaintiff had obtained an order referring the cause and matters to the master under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). The master, however, declining the reference, the plaintiff obtained an order to rescind the last-mentioned order, and delivered notice of trial; and ultimately the order of the 5th of December was obtained by consent. On the taxation the master disallowed the plaintiff all the costs attending the abortive reference.

Lush, in Easter Term last, on the part of the plaintiff, obtained a rule nisi for a review of the taxation. He submitted that the "event of the award" was substantially in favour of the plaintiff, and therefore the plaintiff was entitled to the costs of the reference and award; and that the costs of the abortive reference to the *master under the [*698 statute were costs in the cause, and ought to have been allowed accordingly.

Manisty now showed cause.—The event of the award being partly in favour of the plaintiff and partly in favour of the defendant, the master very properly decided that neither was entitled to the costs. In *Yates v. Knight*, 2 N. C. 277 (E. C. L. R. vol. 29), 2 Scott, 470 (E. C. L. R. vol. 30), by a judge's order a cause and all matters in difference between the parties were referred to arbitration, the costs of the suit and of the reference and award to abide the event of the award. The arbitrator by his award directed that the defendant should by a given day deliver to the plaintiff certain goods, and that the plaintiff should on or before a certain other day pay a certain sum of money to the defendant; that, upon payment of the sum so awarded, the proceedings in the action should cease; and that each party should execute to the other a general release: and it was held, that the award was sufficiently final, and that neither party was entitled to costs.

Bosanquet, J., said: "The costs being directed to abide the event of the award, and the event being partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side." So, in *Boodle v. Davies*, 8 Ad. & E. 200 (E. C. L. R. vol. 80), 4 N. & M. 788, it was held, that, where a cause and all matters in difference are referred to arbitration, with a direction that the costs of the action, reference, and award shall abide the event of such award, and be paid at such time as the arbitrator shall direct, and the arbitrator awards some things in favour of each party, so that the court cannot say upon the whole that the award is in favour of either, no order can be made as to any part of the costs. "The agreement of reference," says Lord Denman, "makes no provision for costs in the event of an award like the present." [JERVIS, C. J.—I observe the rule is so laid down in *Russell on Awards*, 2d edit. p. 380.] These two cases were cited and approved of in *The Matlock Gas-Light and Coke Company v. Peters*, 2 Jurist, N. S. 377; and it is manifest that they lay down a very convenient rule. Then, as to the costs occasioned by the plaintiff's abortive application for a reference to the master under the 3d section of the Common Law Procedure Act, 1854, it is difficult to conceive upon what principle he can claim these. *Doe d. Davies v. Morgan*, 4 M. & W. 171,† is a distinct authority that he is not entitled to them. There a cause was referred before trial, and an arbitration bond entered into, but which could not be made a rule of court, and, the reference proving abortive, the cause was afterwards tried: and it was held that the successful party was not entitled to the costs of the abortive reference as costs in the cause.

Lush, in support of his rule.—The plaintiff is entitled to the whole costs of the reference and award, or at all events to so much of the costs of the reference and award as relate to the action. The parties evidently contemplated an event which upon the balance of accounts would give the one a larger sum than the other was entitled to. In that view, the event is entirely in favour of the plaintiff. The arbitrator finds 80*l.* 14*s.* 11*d.* due to the plaintiff in the action, and 6*l.* to be due to the defendant on the matters in difference; and he directs the balance, 74*l.* 14*s.* 11*d.*, to be paid by the defendant to the plaintiff within ten days. How can it be said that the whole result is not in favour of the plaintiff? If that be not so, the plaintiff at all events is entitled to a portion of the costs. [JERVIS, C. J.—It may be reasonable; but the practice is against you.] The cases, it is submitted, are not conclusive on that point. In *Yates v. Knight* and *Boodle v. Davies*, the court could not, by looking at the award, see which way the event was decided. *695] There is, however, no ambiguity here. Then, the plaintiff was entitled to the costs of the reference to the master: though abortive, it was a step in the progress of the cause. [JERVIS, C. J.—You clearly cannot have the costs of that.]

JERVIS, C. J.—It seems to me that the rule as extracted in Russell on Awards, p. 380,—that, “where, on a reference of a cause and all matters in difference, the submission provides that the costs of the cause and of the reference are to abide the event of the award, that, as a general rule, will be construed to mean the general event of the award, and each party will have to pay his own costs, unless everything be decided in favour of one party,”—is the correct rule. I think this rule must be discharged, but, under the circumstances, without costs.

CERSSWELL, J.—The arbitrator has pronounced two distinct decisions, —in favour of the plaintiff so far as the action is concerned,—in favour of the defendant as to the matters in difference. Neither party is entitled to the costs of the reference.

The rest of the court concurring,

Rule discharged, without costs.

*BATTISHILL v. JOHN REED and EDWARD REED.

May 28.

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The enjoyment of an easement as of right, for twenty (or forty) years next before the commencement of the suit, within the statute 2 & 3 W. 4, c. 71, means a *continuous* enjoyment *as of right*, for twenty (or forty) years *next before* the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year: and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (or forty) years.

Therefore, where the plaintiff had enjoyed a way as of right, and without interruption, from 1800 to 1855, when the action was brought:—Held, that his claim under the statute was defeated by a unity of possession from 1848 to 1855.

In an action by a reversioner for the removal of the eaves from his house, and the erection of a building with eaves and a gutter overhanging his wall,—evidence of diminution of the saleable value of the plaintiff's premises in consequence of the nuisance was rejected; and, it appearing that the cost of replacing the tiles which had been removed would not exceed 30s., and the defendant having paid 40s. into court on account thereof, the jury were directed to find for the defendant, if they thought the sum paid in was sufficient to cover the actual damages sustained by the plaintiff:—

Held, that the evidence tendered was properly rejected, and the direction right,—the true measure of damages in such a case being, not the diminution in the saleable value, although the nuisance might be of a permanent character, but such damages as the jury might think sufficient to compel the defendant to abate the nuisance.

THIS was an action for disturbance of certain alleged rights of the plaintiff.

The declaration stated, that, before and at the times of the committing of the grievances by the defendant as thereafter in the several counts of the declaration mentioned, certain persons were possessed of certain premises consisting of a messuage, buildings, and land, with the appurtenances, situate, &c., as and being tenants thereof to the plaintiff, the reversion thereof then belonging to the plaintiff; and for his first count the plaintiff said, that, before and at the times of the committing the grievances in that count mentioned, one of the said appurtenances was

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a right of way for the occupiers of the said premises and their servants, on foot or with horses, to go, return, pass, and repass from and out of a certain gateway in the said premises, unto, into, through, over, and along certain adjoining land in the said county, towards, unto, and into a certain common or public highway there, and so from thence back again from the said common or public highway, towards, unto, into, through, and along the said adjoining land, unto and into the said gateway, *every year, and at all times of the year, at his and their free will and pleasure; yet that the defendants, well knowing the premises, but intending to injure the plaintiff in his said reversionary interest, and to deprive him of the benefit of the said way, as such appurtenance as aforesaid, whilst the plaintiff was so interested as aforesaid, to wit, on divers days before the commencement of the suit, wrongfully and unjustly placed and erected a certain gate in and across the said way, and also wrongfully placed divers large quantities of planks, stones, wood, and timber in and across the said way, near to the said gateway, so as to prevent egress therefrom, and there wrongfully kept and continued the said gate, planks, stones, wood, and timber for a long time, by which said gate the enjoyment of the said right of way was during all that time greatly and in a permanent manner rendered less convenient and less able at all times to be enjoyed than it theretofore had been, and by which said planks, stones, wood, and timber the said way was during all that time and in a permanent manner obstructed and stopped up; whereby the plaintiff was greatly injured in his said reversionary estate interest.

And for a second count the plaintiff said, that, before and at the times of the committing of the grievances in that count mentioned, another of the said appurtenances was a right of way for the occupiers of the said premises, and their servants, with carts and carriages, to go, return, pass, and repass from and out of a certain gateway in the said premises, unto, into, through, over, and along certain adjoining land in the said county, towards, unto, and into a certain common or public highway there, and so from thence back again from the said common or public highway, towards, unto, into, through, and along the said adjoining land, unto and into the said gateway, every year, and at all times of the year, at his and their free will and pleasure; yet that the defendants, well knowing the premises, but intending to injure the plaintiff in his said reversionary interest, and to deprive him of the benefit of the said way as such appurtenance as aforesaid, whilst the plaintiff was so interested as aforesaid, to wit, on divers days before the commencement of the suit, wrongfully and unjustly placed and erected a certain gate in and across the said way, &c. (as in the first count).

And for a third count the plaintiff said, that, before and at the time of the committing of the grievance in that count mentioned, another of

the said appurtenances was the right to have the rain-water that might or may from time to time naturally fall on a certain roof, part of the said premises, drop from the eaves of the said roof upon the land adjoining the said premises, and to have the said eaves project over the said land: yet that the defendants, further intending as aforesaid, wrongfully and in a permanent manner on divers days removed the said eaves, and, by building on the said adjoining land close to and higher than the said roof, prevented the said roof from having such eaves as aforesaid projecting over the said land, and prevented such rain-water as aforesaid from dropping from the said eaves upon the said land, and penned back the same upon the said roof; whereby the plaintiff was injured in his said reversionary estate and interest.

And for a fourth count the plaintiff said that the defendants, further intending as aforesaid, wrongfully on divers days pulled down certain eaves which were parcel of the said premises, and wrongfully built on the said premises part of a certain building of a permanent nature constituting an encroachment on the said premises, whereby the plaintiff was greatly injured in his said reversionary estate and interest.

And for a fifth count the plaintiff said that the defendant, further intending as aforesaid, wrongfully on divers days erected and kept a certain building with the *eaves thereof projecting over the said premises in a permanent manner, so as to cause the rain-water [699 from time to time falling on the said building to run therefrom and drop on the said premises, whereby the plaintiff was injured in his said reversionary interest, and whereby a certain wall, parcel of the said premises, was rotted and injured, whereby the plaintiff was further injured in his said reversionary estate and interest.

And for a sixth count the plaintiff said, that the defendants, further intending as aforesaid, on divers days wrongfully placed and kept divers great quantities of earth, stone, and rubbish near to the said premises, so as to raise the level of certain land near to the said premises, and to cause the said land to slope down to the said premises, and thereby cause the rain-water from time to time falling on the said land to flow down towards, against, and into the said premises, and to wet and damage the same, whereby the plaintiff was injured in his said reversionary estate.

And for a seventh count the plaintiff said, that, before and at the times of the committing the grievances in that count mentioned, another of the said appurtenances was a right of way for the occupiers of the said premises, and their servants, to go, return, pass, and repass from and out of a certain gateway in the said premises, unto, into, through, over, and along certain land unto and into a certain public footway communicating with divers highways called the Church Path, and so back again from and out of the said footway, unto, into, through, over, and along the said land, unto and into the said gateway: yet the de-

defendants, further contriving as aforesaid, on divers days wrongfully and in a permanent manner obstructed the said footway, and the said way to the said footway, and prevented them from being used as such footway and way; whereby the use of the said appurtenance as a mode of *700] passing from the said premises to *the said highways was entirely lost, and whereby the plaintiff was injured in his said reversionary estate and interest: and the plaintiff claimed 500*l*.

The defendant Edward Reed pleaded,—first, except as to the third, fourth, and fifth counts of the declaration, not guilty,—secondly, as to the first count, that the persons in that count referred to were not, nor was any of them, at the times or any of them of the committing of the grievances in that count mentioned, or any of them, possessed of the supposed right of way in that count mentioned, as therein alleged,—thirdly, a similar plea as to the second count,—fourthly, a similar plea as to the seventh count,—fifthly, as to so much of the fourth count as alleged that the defendant wrongfully built on the premises therein mentioned part of a certain building of a permanent nature, constituting an encroachment on the said premises, and as to the fifth count, payment into court of 40*s*.,—sixthly, as to the third count, and as to so much of the fourth count as alleged that the defendant pulled down certain eaves which were parcel of the said premises, payment into court of 40*s*.

The plaintiff joined issue on the first four pleas of the defendant Edward Reed, and as to the fifth and sixth pleas, respectively, replied that the said sum of 40*s*. so paid into court as in the respective pleas mentioned, was not enough to satisfy the claim of the plaintiff in respect of the causes of action in the respective pleas pleaded to. Joinder.

The defendant John Reed pleaded not guilty; and as to him a *nolle prosequi* was entered.

The cause was tried before Crowder, J., at the last Assizes at Exeter. The plaintiff proved an uninterrupted user of the way, the interruption of which was complained of in the first, second, and seventh *701] counts, from the year 1800 to 1855, when the writ issued. But *it appeared, that, during ten years of that time, viz., from 1843 to 1853, the same tenant had been in possession of both premises.

On the part of the defendant it was submitted, that the fact of there having been unity of possession during part of the time, prevented the application of the statute 2 & 3 W. 4, c. 71.

The learned judge adopted that view, and ruled accordingly.

As to the other counts, the evidence showed that the defendant had built up at the extremity of his land, adjoining the plaintiff's premises, an erection higher than the plaintiff's; and that he had removed the tiles which formed the plaintiff's projecting eaves, and had placed his own eaves so as to overhang the plaintiff's premises, with a zinc gutter

to intercept the drip. It was proved that the tiles so removed might have been replaced at a cost of about 80s. The only question upon that was, whether enough had been paid into court to cover the actual damage,—the learned judge having refused to allow the plaintiff to go into evidence to show a deterioration in the saleable value of the premises.

The jury found that the sum paid in was sufficient, and accordingly returned a verdict for the defendant.

Collier, in Easter Term, moved for a new trial on the ground of misdirection.—The first question turns upon the construction of the 2d and 4th sections of the prescription act, 2 & 3 W. 4, c. 71. The 2d section enacts. “that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or *being the property of [702 any ecclesiastical or lay person, or body corporate, *when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and, where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed *absolute and indefeasible*, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.” And the 4th section enacts “that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made.” [CRESSWELL, J.—The plaintiff was bound to make out a forty years’ user, and to show that it was an user as of right. The question is whether an user by a tenant, who could not be interrupted, is an user *as of right*.] *Lowe v. Carpenter*, 6 Exch. 825,†—where it was held, that pleas of twenty and forty years’ user respectively under this act, are not supported by proof of user for forty years and upwards before the commencement of the action to within fourteen months of it; and that

*703] *some act of user must be shown to have been exercised in the year in which the action is brought,—seems at first sight adverse to the plaintiff: but here there had been no cesser of the enjoyment down to the time of bringing the action. Alderson, B., there says,—“Parker v. Mitchell, 11 Ad. & E. 788 (E. C. L. R. vol. 39), 3 P. & D. 655, decides that enjoyment during the *last* year is material; and Bailey v. Appleyard, 8 Ad. & E. 161 (E. C. L. R. vol. 35), 3 N. & P. 257,(a) decides that the enjoyment must be during the *first* year; and Carr v. Foster, 3 Q. B. 581 (E. C. L. R. vol. 43), 2 Gale & D. 753, seems to intimate that the intermediate time is not so material. Whether that distinction be sound or not, it appears to me to be a very convenient one; for, one or two witnesses might be sufficient to prove the enjoyment at the commencement and expiration of the term, whereas it might require forty witnesses to prove the exercise of the enjoyment during the whole of the intermediate time.” Here, the plaintiff proved the enjoyment during the first and last years. [CROWDER, J.—I ruled in conformity with Onley v. Gardiner, 4 M. & W. 496,† where the Court of Exchequer held that the enjoyment of an easement as of right for twenty years next before the commencement of the suit, means a *continuous* enjoyment as of right, for the twenty years next before the commencement of the suit, of the easement *as* an easement, without interruption acquiesced in for a year; and therefore it is defeated by unity of possession during all or part of the twenty years.] It is conceded that the period during which there was unity of possession is not to be taken into consideration. Here there was an user of forty years prior to the year 1843, when the unity of possession began. There is no case precisely in point: but it is submitted that there has been substantially such an user as to satisfy the statute.(b) Then, as to the *704] *removal of the eaves. The evidence showed a permanent injury to the premises, beyond the actual present damage: and the plaintiff ought to have been allowed to give evidence to show that the saleable value of the premises had been materially affected by the wrongful act of the defendant. [CROWDER, J.—Is it not usual in these cases to take a verdict for nominal damages in the first instance? Non constat that the nuisance will be continued.] No doubt it is usual to take a verdict for nominal damages in the first instance. But there is no rule of law which imperatively restricts the plaintiff to nominal damages. In Jesser v. Gifford, 4 Burr. 2141, which was an action for erecting a wall whereby the plaintiff’s lights were obstructed, the declaration contained two counts, in the second of which the plaintiff counted as the reversioner; and, a verdict having been given for the plaintiff, with general damages, it was moved in arrest of judgment that the action would not lie by a reversioner, it being only an injury to the per-

(a) See a note on that case inserted as an addendum in 11 Ad. & E.

(b) See Payne v. Shedden, 1 M. & Rob. 382, Carr v. Foster, 3 Q. B. 581 (E. C. L. R. vol. 43), 2 Gale & D. 753, and Ward v. Ward, 7 Exch. 838.†

son in possession. But Aston, J., said, "he had looked into it, and had found a case S. P. with the present; and accordingly cited *Tomlinson v. Brown*, as of H. 28 G. 2, but it was determined in Easter Term, 1755.(a) It was an action brought by the owner of the inheritance for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. Mr. Norton, in arrest of judgment, objected that a temporary nuisance cannot be an injury to the inheritance: it may be abated before the estate comes into possession: and he cited *Some v. Barwish*, Cro. Jac. 231; and observed, that, if this would hold, the defendant would be liable to a double action,—one by the possessor of the estate, the other by the reversioner. Mr. Crowle showed cause on behalf of the plaintiff, and insisted that it was a damage *done [705 to the inheritance: *if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it.* The court were of opinion that an action might be brought by one in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it." And the rule was discharged. [JERVIS, C. J.—That does not mean that he is to recover to the amount of the injury.] In the notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 322 e, it is said, that "the question in all these cases seems to be, whether the injury complained of is not a damage to the inheritance as well as to the lessee, so that, if the reversioner wanted to sell the reversion, the injury would lessen the value of it." [JERVIS, C. J.—That has reference to the foundation of the action, not the measure of damages. CROWDER, J.—Do you find any case where substantial damages have been recovered under similar circumstances, in an action by the reversioner?] None precisely in point.

JERVIS, C. J.—The rule may go upon the last point: but not as to the other. The statute contemplates a *continuous* enjoyment of the easement claimed, *as of right*, for twenty (or forty) years next before the commencement of the suit, without interruption acquiesced in for a year. In the present case, there was an interval of ten years, when there was no user at all. In computing the period, that interval cannot be cut out. In other parts of the statute provision is made for the exclusion of certain periods from the computation: but, under ss. 2 and 4, the user must be continuous and ending next before the commencement of the action or suit.(b)

*CRESSWELL, J.—The statute requires a forty years' continuous user, and forty years next before the commencement of the suit. [706 Here there was an interval during the forty years next before the commencement of the action when there was no user as of right. On the first point, therefore, there will be no rule. As to the other point, how-

(a) *Thomlinson v. Brown*, Sayer, 215.

(b) See *The Monmouth Canal Company v. Harford*, 1 C. M. & R. 614, 631,† 5 Tyrwh. 68, 85; *Richards v. Fry*, 7 Ad. & E. 698 (E. C. L. R. vol. 34), 3 N. & P. 67.

ever, as it is involved in a little difficulty, I agree with my Lord that there should be a rule.

A rule nisi having accordingly been granted,(a)

Kinglake, Serjt., and *Kingdon* now showed cause.—The facts are shortly these:—The plaintiff being possessed of a messuage, the wall of which was built at the extremity of his land, with a tiled roof having eaves projecting over the adjoining land of the defendant, and having acquired an easement of drip thereon, the defendant erected a building close to the plaintiff's wall and higher than his messuage, and in so doing necessarily removed the plaintiff's projecting eaves, and constructed his own roof with eaves overhanging the plaintiff's roof, but with a zinc gutter for the purpose of intercepting the flow of rain-water therefrom. At the trial the plaintiff offered evidence of permanent damage from this act of the defendant's, in the diminution thereby of the saleable value of the plaintiff's messuage. This evidence was objected to on the part of the defendant, inasmuch as the plaintiff's claim must be confined to damages sustained down to the time of the *707] *commencement of the action. The learned judge, yielding to the objection, rejected the evidence, but allowed the plaintiff to prove what would be the cost of replacing the eaves removed; and his witnesses estimated it at 30s. The ground upon which it is held, that, in an action on the case for a nuisance, the plaintiff cannot recover for damage sustained subsequent to the bringing of the action, is, that the continuance of the nuisance is a fresh cause of action: *Holmes v. Wilson*, 10 Ad. & E. 503 (E. C. L. R. vol. 37); *Thompson v. Gibson*, 7 M. & W. 456;† notes to *Scott v. Shepherd* (2 W. Bl. 892), 2 *Smith's Leading Cases*, 217, where it is said, that "the continuance of a trespass, though without fresh violence, is a new trespass: thus, if a log were thrown upon A.'s land, so as to be a trespass to the realty, he might, after having recovered damages in trespass for placing it there, sue in trespass again for its continuance (citing *Holmes v. Wilson* and *Thompson v. Gibson*); for, there is a legal obligation upon the wrongdoer to discontinue a trespass or remove a nuisance; though there is no such obligation upon a trespasser to replace what he has destroyed, albeit he is liable in one action of trespass to compensate in damages the loss which he has occasioned: *Clegg v. Dearden*, 12 Q. B. 576 (E. C. L. R. vol. 64)." [WILLIAMS, J.—Where the action is for a nuisance in the defendant's own land, he may always discontinue it: but, where it is for a trespass, in respect of an act done in the plaintiff's land, he cannot enter to remove it without committing another trespass.] In *Fay v. Prentice*, 1 C. B. 828 (E. C. L. R. vol. 50), the plaintiff recovered 40s. in an action on the case for the erection by the defendant of a cor-

(a) "To show cause why the verdict should not be set aside, and a new trial had, on the ground of the misdirection of the judge presiding at the trial, with respect to the measure of damages to the plaintiff's reversion from the acts of the defendant as in the third, fourth, and fifth counts of the declaration mentioned, and his rejecting evidence applicable to the same, tendered by the plaintiff."

nice projecting over the land of the plaintiff. [JERVIS, C. J.—The rule suggested in *Holmes v. Wilson* and *Thompson v. Gibson*, is adopted by Professor Sedgwick,—see Sedgwick on Damages, 2d edit. p. 144, where it is said,—“Every continuance of a nuisance is held to be a fresh one, and therefore a fresh *action will lie.(a) ‘And,’ says Blackstone,(b) speaking of the same subject, ‘very exemplary damages [*708 will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.’(c) On this ground, that suit can be brought toties quoties, it has been decided, that, in an action on the case for a nuisance, damages sustained subsequent to the bringing of the action are not recoverable.(d) In regard to permanent or continuing nuisances, it has been questioned how far the defendant is liable after he has parted with the possession of or the title to the premises. As a general rule, the erector of the nuisance is answerable for the continuance of it, not only where he has demised the property with the nuisance on it, reserving rent, but where the erection was made on the land of another, and though he has no right to enter for the purpose of removing it.”(e) WILLIAMS, J., referred to *Bowyer v. Cook*, *4 C. B. [*709 236 (E. C. L. R. vol. 56). In trespass for placing stumps and stakes on the plaintiff’s land, the defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass: the plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him: and it was held that the leaving the stumps and stakes on the land was a new trespass.] In the notes to *Hambleton v. Veere*, 2 Wms. Saund. 169, 171 c, it is said, that, “in trespass, and in tort, new actions may be brought as often as new injuries and wrongs are repeated; and therefore damages shall be assessed only up to the time of the wrong complained of.” In giving the judgment of the court in *Clegg v. Dearden*, Lord Denman says: “By the custom, the defendant was entitled to excavate to the

(a) 3 Bl. Com. 220; *Vedder v. Vedder*, 1 Denio (American), 257; *Delaware and Raritan Canal Company v. Wright*, 1 Zabriskie (American), 469.

(b) 3 Bl. Com. ch. 13.

(c) “If a party against whom a verdict in an action of this kind has been recovered does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages,”—Wheaton’s Selwyn’s Nisi Prius, Vol. II. p. 1141.

(d) *Duncan v. Markley*, 1 Harper (American), 276; *Blount v. M’Cormick*, 3 Denio (American), 283; *Thayer v. Brooks*, 17 Ohio (American), 489.

(e) *Rosewell v. Prior*, 12 Mod. 635, 1 Ld. Raym. 713, 2 Salk. 460; *Thompson v. Gibson*, 7 M. & W. 456;† *Holmes v. Wilson*, 10 Ad. & E. 503 (E. C. L. R. vol. 37; *Staple v. Spring*, 10 Mass. (American), 74; *Fish v. Dodge*, 4 Denio (American), 411. But, though there is a legal obligation to discontinue a trespass or remove a nuisance, no such obligation lies on a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in trespass to compensate in damages for the loss sustained. Therefore, where the owner of a coal-mine excavated as far as the boundary, and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed and did damage,—held, that, though the party excavating was liable in trespass for breaking into the neighbouring mine, he was not liable in case for omitting to close up the aperture on his neighbour’s soil, though continuing damage resulted: *Clegg v. Dearden*, 12 Q. B. 576 (E. C. L. R. vol. 64).

boundary of his mine, without leaving any barrier: and the cause of action, therefore, is, the not filling up the excavation made by him on the plaintiffs' side of the boundary, and within their mine. It is not, as in the case of *Holmes v. Wilson*, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiffs, as in the case of *Thompson v. Gibson*. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action *710] of trespass to compensate in damages for *the loss sustained. The defendant, having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass: but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty." The distinction there pointed out between the legal obligation to discontinue a trespass or remove a nuisance on a person's own land and on the land of another, is recognised by Parke, B., in *Nicklin v. Williams*, 10 Exch. 259, 266.†

The court called upon—

Collier and Karslake to support the rule.—The evidence tendered was improperly rejected, and the direction wrong. Though the plaintiff's eaves might have been restored for 30s. if the adjoining building had not been erected, no such restoration could take place so long as the building remained. The plaintiff therefore sustained a permanent injury, in being prevented from raising his house if so minded, as well as from the circumstance of its market value being diminished by the defendant's act. [JERVIS, C. J.—The rule was granted only upon the question whether my Brother Crowder was right in excluding evidence of the diminution of the saleable value of the plaintiff's premises. Suppose I improvidently build a wall against your ancient window, and you bring an action for that injury to your reversion, and recover substantial damages; and suppose you sell your reversion the next day, and your vendee brings another action, what answer should I have? According to your argument, I might be compelled to pull down my wall, though I had compensated you to the full extent of the deterioration of your premises. CRESSWELL, J.—Is an action for slander of title maintainable, where there has been no attempt to sell, and no actual damage *711] *sustained?] In that species of action, there must be malice in the defendant, and injury to the plaintiff. In the notes to *Pomfret v. Ricroft*, 1 Wms. Saund. 322 d, 322 e, it is said: "In many cases the reversioner may bring an action as well as the tenant. As in *Jesser v. Gifford*, 4 Burr. 2141, an action by the reversioner, for erecting a wall, whereby his light was obstructed, was held maintainable. The

question in all cases of this kind seems to be, whether the injury complained of is not a damage to the inheritance as well as to the lessee; so that, if the reversioner wanted to sell the reversion, the injury would lessen the value of it. *Queen's College v. Hallett*, 14 East, 489. And it must be expressly stated in the declaration, or appear by necessary inference, that the thing complained of is of a permanent nature injurious to the reversion: *Jackson v. Pesked*, 1 M. & Selw. 234. A simple trespass, even accompanied by a claim of right (as, an entry on land made in exercise of an alleged right of way), is not sufficient to maintain such an action: *Baxter v. Taylor*, 4 M. & Ad. 72 (E. C. L. R. vol. 24), 1 N. & M. 11. Nor the mere obstruction of a way belonging to the estate: *Hopwood v. Schofield*, 2 M. & Rob. 34: though it might be otherwise if such obstruction operated as a denial of the right: for, it has been held that a reversioner may maintain an action for a nuisance which produces no present injury to his reversion beyond that to the right, and which may be removed before the reversion comes into possession; as in the instance above put of obstructing an ancient window. See also *Bower v. Hill*, 1 N. C. 549 (E. C. L. R. vol. 27), 1 Scott, 526; *Shadwell v. Hutchinson*, M. & M. 350 (E. C. L. R. vol. 22). So, he may bring a fresh action, and recover substantial damages if the nuisance be continued: *Shadwell v. Hutchinson*, 2 B. & Ad. 97 (E. C. L. R. vol. 22). And it has been laid down, that the removal of any portion of the soil must, in general, be esteemed such an injury, because it tends to alter the evidence of *title: *Alston v. Scales*, 9 Bingh. 3 (E. C. L. R. vol. 28), 2 Moore & Scott, 5 (E. C. L. R. vol. 28). [*712 Building a roof with eaves which discharge rain-water by a spout into adjoining premises, is an injury for which the reversioner may sue, if the jury think there is a damage to the reversion: *Tucker v. Newman*, 11 Ad. & E. 40 (E. C. L. R. vol. 39), 3 P. & D. 14." If, as is put in *Tomlinson v. Brown*, and adopted by the court in *Jesser v. Gifford*, 4 Burr. 2141, "the reversioner wanted to sell the reversion, this obstruction would certainly *lessen the value* of it." [WILLIAMS, J.—If the obstruction were continued. JERVIS, C. J.—The question in *Jesser v. Gifford* was, whether the action would lie at the suit of the reversioner. Blackstone says,—3 Comm. 220,—"very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardness to continue the nuisance."] If substantial damages may be recovered in the second action, it is difficult to see upon what principle they may not in the first. [CRESSWELL, J.—If the jury choose to give substantial damages even in the first action, I apprehend there is nothing to prevent them from so doing. But here you are insisting upon a *particular mode of estimating the damages*, on a supposition that you are entitled to the difference between the saleable value of the premises in their former and in their present state.] Is not the reversioner to recover the damage actually inflicted on him by the wrongdoer, whether

it be by an act done on his own land or on mine? In *Holmes v. Wilson* the plaintiff only recovered nominal damages in the second action. But, in *Shadwell v. Hutchinson*, the nuisance being continued, the jury gave the plaintiff 100*l.* in the second action, which was a full compensation for the obstruction of his light.^(a) [WILLIAMS, J.—Suppose a third action *718] brought, *after substantial damages recovered in the second, what damages would the plaintiff have?] Nominal, of course. [JERVIS, C. J.—The defendant ought in such case to be able to plead judgment recovered.] In *Hosking v. Phillips*, 3 Exch. 168,† in case for injury to the plaintiff's reversionary interest, by pulling down a messuage in the occupation of the plaintiff's tenant, it was held that the proper mode of estimating the damages was, "by how much less the premises would sell for in consequence of the wrongful act of the defendant." Parke, B., says,—“The reversion is rendered less valuable, because, instead of the house and land, the plaintiff had the land alone without the house: and the jury should only have considered how much less the land was worth in consequence of the defendant's wrongful act.” [JERVIS, C. J.—That is quite right. The house being pulled down, the plaintiff was entitled to damages commensurate with the injury he sustained. There is a material distinction between a demolition and an erection.] In the case of a demolition, it is true, there can be no new action. In the present case, if the plaintiff be held disentitled to substantial damages, he is practically left without remedy.

JERVIS, C. J.—I am of opinion that this rule should be discharged. It is now perfectly settled that a man may be guilty of a nuisance in erecting or continuing a building on the land of another: it was so held by the Court of Queen's Bench in *Holmes v. Wilson*, 10 Ad. & E. 503 (E. C. L. R. vol. 37), by the Court of Exchequer in *Thompson v. Gibson*, 7 M. & W. 456,† and by this court in *Bowyer v. Cook*, 4 C. B. 236 (E. C. L. R. vol. 56). The only question for our consideration upon the present occasion is, whether the evidence which was tendered on the part of the plaintiff at the trial, and rejected by my Brother Crowder, was admissible. The evidence so rejected was evidence of the diminution in value of the plaintiff's premises by the *acts complained *714] of. My Brother Crowder rejected that evidence, because the defendant was liable to another action for the continuance of the nuisance. It appears to me that he was perfectly right in so doing. It was for the jury to say what damages the plaintiff was entitled to; but, as a principle of computation, the diminution in the saleable value of the premises was not the true criterion. Every day that the defendant continues the nuisance, he renders himself liable to another action. I think the jury did right to give, as they generally do, nominal damages only in the first action; and, if the defendant persists in continuing the

(a) But a rule nisi was granted for reducing the damages, on affidavit of the obstruction having been abated. See 2 B. & Ad. 97 (E. C. L. R. vol. 22).

nuisance, then they may give such damages as may compel him to abate it, but not, as was insisted here, the difference between the original value of the premises and their present diminished value.

CRESSWELL, J.—The only question for our consideration is, whether my Brother Crowder was right in rejecting the evidence of diminution in the saleable value of the plaintiff's premises, on the supposition that they were to remain in statu quo. I agree with my Lord in thinking that he would have done wrong if he had admitted it. Formerly, the party grieved might, under such circumstances as these, have resorted to a quod permittat prosternere, or an assize of nuisance. These remedies are now taken away; and even in Sir W. Blackstone's time they appear to have been long disused. "Both these actions," says that learned author, 3 Comm. 222, "of assize of nuisance, and of quod permittat prosternere, are now out of use, and have given way to the action on the case, in which no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable *by one that hath possession only, against another that hath like possession, [715 the process is therefore easier: and the effect will be much the same, unless the man has a very obstinate as well as an ill-natured neighbour, who had rather continue to pay damages than remove his nuisance; for, in such a case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his posse comitatus, or the power of the county, to level it."(a) In the course of the argument, I suggested the case of slander of title, which is very analogous. In order to sustain such an action, the plaintiff must allege special damage; he must aver and prove an attempt to sell, and that, in consequence of the speaking or writing the words, he was prevented from selling. That was expressly held by this court in *Malachy v. Soper*, 3 N. C. 371 (E. C. L. R. vol. 32), 3 Scott, 723 (E. C. L. R. vol. 36), where Tindal, C. J., in delivering the judgment, says,—after referring to the cases of *Lowe v. Harewood*, Cro. Car. 140, Sir W. Jones, 196; *Sir John Tasburgh v. Day*, Cro. Jac. 484, *Manning v. Avery*, 3 Keb. 153, and *Cane v. Golding*, Style, 169, 176,—“The next question is, has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that by the speaking he could not sell or lease (*Gerrard v. Dickenson*, Cro. Eliz. 196, *Lowe v. Harewood*, Cro. Car. 140, Sir W. Jones, 196); and that it will not be sufficient to say only that he had an intent to sell, without alleging a communication for sale:” *Swead v. Badley*, 1 Roll. 244. So, here, the consideration of the subject might have been very different if the plaintiff had alleged and proved an attempt to sell

(a) These remedies were abolished by the 3 & 4 W. 4, c. 27, s. 36.

*716] the premises, which had failed in consequence of the nuisance.
 *In the absence of such an allegation and such proof, I am of opinion that the learned judge was quite right in rejecting the evidence which was tendered. The plaintiff had no right to assume that things would remain as they are, notwithstanding the verdict. There is no doubt, upon the authorities, that an action might be maintained for continuing the erection after judgment recovered in the first action. If the plaintiff is to recover substantial damages for the nuisance in the first action, I do not understand upon what ground it is that he is permitted to recover damages in a second action. I concur with my Lord in thinking that the rule should be discharged.

WILLIAMS, J.—I am entirely of the same opinion. If the evidence in question had been admitted, it would have formed part of the materials which the judge would have had to sum up in order to enable the jury to measure the damages the plaintiff was entitled to recover. In other words, he must have told the jury that, in estimating the damages, they might take into consideration the diminution in value of the plaintiff's premises in consequence of the nuisance. If he had so done, that clearly would have been a misdirection. I do not undertake to say whether or not this case falls within the principle of *Holmes v. Wilson*. Where an action has been brought for erecting and leaving a building on the plaintiff's land, a fresh action will lie for continuing it there, and action after action may be brought until it is removed. Whether this case falls within that principle I will not undertake to say. But, assuming that it does, *Holmes v. Wilson* has been followed by *Thompson v. Gibson*; (a) and *Thompson v. Gibson* and *Bowyer v. Cook* have established that fresh actions may be brought as long as the nuisance is continued. It clearly would have
 *717] been *misdirection to have told the jury that, in estimating the damages, they might take into consideration the diminution in the value of the plaintiff's premises, if he might afterwards have brought a fresh action from day to day for the continuance of the nuisance: and, according to *Shadwell v. Hutchinson*, 2 B. & Ad. 97 (E. C. L. R. vol. 22), it seems that the jury would be right in giving vindictive damages. It is impossible that, after the plaintiff has once recovered the full value, the defendant is to be liable to a succession of actions for the continuance of the nuisance. I think my Brother Crowder did quite right in rejecting the evidence.

WILLES, J.—I am of the same opinion. It appears from the note of the learned judge who tried the cause, that Mr. *Karslake* proposed to give evidence to show the diminished value of the plaintiff's premises in consequence of the erection of the defendant's building. That evidence was rejected, because that might be the subject of another action. The attempt to recover substantial damages in the first instance is certainly inconsistent with the theory of the action. At common law, the free-

(a) *Holmes v. Wilson* does not appear to have been cited in *Thompson v. Gibson*.

holder would in a case like this have had an assize of nuisance. This appears from Fitzherbert's *Natura Brevium*, 184 B, where it is said that "a man shall have an assize of nuisance for building of a house higher than his house, and so near his that the rain which falleth upon that house falleth upon the plaintiff's house." Again, p. 185 G, "And if a man levy a nuisance unto the house of another who hath therein an estate but for term of years, then he shall not have an assize of nuisance, but an action upon the case against him, because he hath no freehold. But yet it seemeth he may enter and abate the nuisance." The common sense of the matter is also opposed to the argument urged on the part of the plaintiff. To hold that the plaintiff *could recover a full compensation for the injury done to his reversion in the first [*718 action, when he may have repeated actions for the continuance of the nuisance, would be manifestly inconsistent and absurd.

Rule discharged.

BRAY v. CHANDLER. *May 29.*

By agreement in writing, A. was appointed surveyor or agent of B., for two years and a half, at a salary of 200*l.* per annum, payable quarterly; and A. was in addition to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. The agreement contained a stipulation "that under no pretence whatsoever should A. contract any debt in the name of B., or be considered as his agent to receive any money on his account," and a proviso, that, in the event of a breach, the agreement should immediately cease and determine.

To an action against B. for dismissing A. before the expiration of the term, B. pleaded (thirdly) that A., whilst he was such surveyor, contrary to the agreement, and without his knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from them to B., as and under the pretence of being B.'s agent in that behalf," &c. :—

Held, that the receipt by A. of deposit-money from persons to whom he had agreed to let houses on account of B. was a breach of the agreement, and a cause of dismissal; and that proof that he had done so sustained the third plea.

A. also claimed commission for letting certain houses. As to this, the evidence was, that the agreement for the letting was entered into with another agent, K., but that the tenants were introduced to K. by A. :—Held, that, under the terms of the agreement, A. was entitled to the commission.

THIS was an action against the defendant for wrongfully dismissing the plaintiff from his employment as surveyor or agent, and for commission.

The declaration stated, that, by a certain agreement made between the plaintiff and the defendant, he the defendant agreed to employ the plaintiff as his surveyor on the Northumberland Park estate, in Tottenham, in the county of Middlesex, at an annual salary of 200*l.*, for two years and a quarter from the 25th of December, 1854, upon the terms and conditions hereinafter mentioned, if the plaintiff should continue for that period efficiently to discharge his duties as such surveyor; and, in addition to such salary, the defendant agreed to allow to the plaintiff for every house which he should let on the estate, and the agreement for

the letting of which should be entered into by the defendant with the
*719] person *taking the same, a commission at the rate of 5*l.* for every
100*l.* on the rent to be received from such tenant for the first
year of his tenancy, and a further commission of 1½ for every 100*l.*, on
the amount of purchase-money on all sales of property which the defend-
ant should employ the plaintiff to effect on the said estate, and which he
should be able to carry through to completion, and on the amount of all
sums of money obtained by or through the agency of the plaintiff by way
of mortgage on any part of the said estate, at the request in writing of
the defendant; and the defendant thereby then further agreed with the
plaintiff to pay him the said salary quarterly; and the plaintiff thereby
then agreed with the defendant to reside on the said estate during the
said period of two years and one quarter, and to the utmost of his power
to forward the interest of the defendant in reference to the said estate,
and particularly to prepare all such plans, and to make all such admea-
surements, and superintend the erection of all such works, and make all
such valuations and surveys, as the defendant should require: and it was
thereby then further agreed that the plaintiff should not contract any
debt in the name of the defendant, or be considered as his agent to
receive any money on his account; and that, in the event of the plaintiff
breaking any of the provisions of the said agreement, or compounding
with his creditors, or becoming bankrupt or insolvent, or suffering any
execution to be issued against him or his effects, then the said agree-
ment with the defendant should cease and determine from the day on
which the same should happen, but without prejudice to the right and
remedy of the plaintiff for the recovery of salary or other moneys due to
him under the said agreement: Averment, that, although the plaintiff
became and was the defendant's surveyor under the said agreement and
*720] as therein mentioned, and upon the terms *therein mentioned;
and although he continued to be and to act as such surveyor, and
efficiently to discharge his duties as such surveyor until the 1st of Sep-
tember, 1855, and had been ready and willing to continue as such sur-
veyor for the period mentioned in the said agreement, and had performed
all things on his part to be performed, and had not broken any of the
provisions of the said agreement, or compounded with his creditors, or
become bankrupt or insolvent, or suffered any execution to be issued
against him or his effects,—yet the defendant, on the said 1st of Sep-
tember, 1855, wrongfully, and in breach of his said agreement, dis-
charged the plaintiff from his employment, and refused to allow him to
continue to be and to act as his the defendant's surveyor according to the
said agreement, or to pay him the plaintiff his salary under and accord-
ing to the same.

The declaration also contained a count for work and labour: and the
plaintiff claimed 700*l.*

The defendant pleaded, amongst other pleas,—first, that he did not

agree as alleged,—secondly, to the first count, that the plaintiff, whilst he was such surveyor as aforesaid, contrary to the said agreement, and without the knowledge and against the will of the defendant, contracted a debt in the name of the defendant, wherefore the said agreement thereby ceased and determined; and that thereupon the defendant, having notice of the premises, forthwith, and before any breach by him of the said agreement, put an end to the same accordingly, and gave notice to the plaintiff thereof, which was the breach in the first count mentioned,—thirdly, to the same count, that the plaintiff, whilst he was such surveyor as aforesaid, contrary to the said agreement, without the defendant's knowledge, and without his authority, and against his will, received from divers persons divers sums of money *then due and payable* from and by them *respectively to the defendant, to wit, to the [721 amount of 10*l.*, to wit, as and under the pretence of being, and he the plaintiff then affecting to be, the defendant's agent in that behalf, and on his account, contrary to the said agreement; wherefore the said agreement thereby ceased and determined; and thereupon the defendant, having notice of the premises, forthwith, and before any breach of the said agreement by him, put an end to the same accordingly, and gave notice thereof to the plaintiff, which was the breach in the first count mentioned. Issue thereon.

The cause was tried before Willes, J., at the sittings at Westminster after last Hilary Term. The plaintiff put in the following agreement:—

“An agreement made the 21st day of February, 1855, between Benjamin Chandler, of, &c., of the one part, and William Bray, of, &c., surveyor, of the other part:

“The said Benjamin Chandler agrees to employ the said William Bray as his surveyor on the Northumberland Park estate, Tottenham, at a salary of 200*l.* per annum, for two years and a quarter from the 25th day of December last, upon the terms and conditions hereinafter mentioned, if the said William Bray shall continue for that period efficiently to discharge his duties as such surveyor: and, in addition to the salary hereinbefore mentioned, the said Benjamin Chandler agrees to allow to the said William Bray, for every house which he shall let on the estate, and the agreement for the letting of which shall be entered into by the said Benjamin Chandler with the person taking the same, a commission at the rate of 5*l.* per centum upon the rent to be received from such tenant for the first year of the tenancy, and a further commission of 1½ per centum on the amount of purchase-money on all sales of property which the said Benjamin Chandler shall employ the said William Bray to effect on the said estate, and which he *shall be [722 able to carry through to completion, and on the amount of all sums of money obtained by or through the agency of the said William Bray by way of mortgage on any part of the said estate, at the request in writing of the said Benjamin Chandler; but nothing herein contained

is to prevent the said William Bray from making any proper charge against the builders personally, which he or they shall mutually agree upon :

"That the salary shall be payable quarterly during the above term, without any deduction, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December, the first payment to be made on the 25th day of March next, and shall include every charge which the said William Bray could make against the said Benjamin Chandler for stationery or office expenses, or on any account whatsoever not authorized by the said Benjamin Chandler, except the commissions hereinbefore mentioned :

"That the said William Bray shall during that period reside on the estate, and shall to the utmost of his power forward the interest of the said Benjamin Chandler in reference to the estate, and particularly shall prepare all such plans and make all such admeasurements, and superintend the erection of all such works, and make all such valuations and surveys, as the said Benjamin Chandler shall require :

"That under no pretence whatsoever shall the said William Bray contract any debt in the name of the said Benjamin Chandler, *or be considered as his agent to receive any money on his account :*

"That, in the event of the said William Bray breaking any of the provisions of this agreement, or compounding with his creditors, or becoming bankrupt or insolvent, or suffering any execution to be issued against him or his effects, then the agreement with the said Benjamin *723] Chandler hereby made shall cease and determine from *the day on which the same shall happen, but without prejudice, however, to the right and remedy of the said William Bray for the recovery of salary or other moneys due to him under this agreement."

The defendant proved that the plaintiff had received 30s. from each of five persons as deposit-money upon the letting of houses for the defendant ; and this, it was insisted, was a receipt of money in breach of the agreement, and proved the third plea.

On the other hand, it was submitted, that the receipt of deposits on the letting of houses was not the kind of receipt of money contemplated by the agreement, and did not justify the dismissal of the plaintiff, or sustain the third plea.

The plaintiff, in addition to salary under the agreement, claimed a sum of 14*l.* for commission. As to this the evidence was, that one King was authorized to make contracts and to receive money on the part of the defendant, and that he had in fact let the houses and received commission for so doing : but the plaintiff also claimed to be entitled to commission under the agreement, inasmuch as the parties had come to him in the first instance, and he had referred them to King.

The learned judge intimated an opinion that the evidence given on the part of the defendant did not prove the third plea ; and he directed

the jury to find for the plaintiff for the amount due for salary and commission, reserving leave to the defendant to move to reduce the verdict by the amount of the salary, if the court should not assent to his construction of the agreement. A verdict was found for the plaintiff, damages 200*l*.

Kinglake, Serjt., in Easter Term last, obtained a rule calling upon the plaintiff to show cause "why the verdict should not be reduced by the sum of 186*l*., upon the ground of misdirection by the judge presiding at the said *trial, in ruling that there was no evidence to support the third plea; and also that the facts stated in the third [*724 plea were no answer to the declaration, not being within the terms of that clause of the agreement having reference to the receipt of money by the plaintiff, and set out in the said declaration, so as to justify the defendant in dismissing the plaintiff from his service,—leave being reserved to the said defendant to move for a new trial in this cause, if, upon the argument of the rule, the facts should appear to the court to render it necessary."

Byles, Serjt., and *Macnamara*, now showed cause.—1. The material words of the agreement are, "that, under no pretence whatsoever shall the said William Bray contract any debt in the name of the said Benjamin Chandler, or be considered as his agent to receive any money on his account;" and the third plea alleges, that the plaintiff, contrary to the said agreement, and without the defendant's knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from and by them respectively to the defendant. The question is, whether the receipt from proposed tenants of deposits on the letting of houses to them, was a receipt of money within the meaning of the agreement. Construing the language of the agreement literally, it clearly was not; the receipt of deposits not being the receipt of *debts* due to the defendant. It never could have been intended to interdict the receipt of small sums of money by the plaintiff as incidental to his employment as an agent to let; but merely to negative his authority to bind the defendant, so that his receipts might be set up against him by his debtors. [CRESSWELL, J.—The defendant may have thought him a very good agent for the purpose of letting, though he might not choose to trust him to receive money for him. JERVIS, C. J.—If the object was to prevent the *receipt of money by the plaintiff, the smallness of the sums [*725 would be quite immaterial. CRESSWELL, J.—Besides, it might be evidence of authority in other cases. WILLIAMS, J.—You must be prepared to say, that, if the plaintiff represented himself as the defendant's agent, and received money to any amount, he would not have committed a breach of the agreement.] The very nature of the employment would preclude the receipt by the plaintiff of large sums. [JERVIS, C. J.—Where is the authority to receive *any* money?] The

receipt of deposits must necessarily be incidental to the authority to let. The object of the agreement was, to circumscribe the powers of the agent. He was not to bind his principal by giving receipts. [CRESSWELL, J.—If the agent has authority to receive money, he must also have authority to give discharges.] 2. Whatever be the true construction of the agreement, the next question is, whether the third plea was proved. It alleges that the plaintiff received from divers persons moneys *due and payable* from them to the defendant. The evidence was, that he received from five several persons who were about to become tenants to the defendant, the sum of 30*s.* each by way of deposit. That was not a receipt of money *due*. To make it a debt, there must have been a contract in writing; for, though a contract for a present letting may be by parol, a contract for a prospective letting, being an agreement for an interest in land, within the 4th section of the 29 Car. 2, c. 8, must be in writing. [WILLES, J.—See *Edge v. Strafford*, 1 C. & J. 391.†] The plea must be proved as it stands: to amend it, would clearly be to violate the justice of the case. [JERVIS, C. J.—I think the plea is a very good plea of the receipt of money on account of the defendant; and it is substantially proved. I think it is impossible to say that the money received was not money due and payable *726] to the defendant. It is not competent to the *agent to set up the statute of frauds, when the tenants do not object that there has been no formal or valid demise.]

Kinglake, Serjt., and *Edwards*, in support of the rule.—The evidence clearly showed, indeed the plaintiff's own statement of the account admitted, a receipt of 7*l.* 10*s.* as for money due and payable to the defendant in respect of premises let by the plaintiff. The payment of the deposit was part of the agreement of letting. [JERVIS, C. J.—Suppose goods are sold at a credit of *six* months, and at the end of *five* months the buyer goes and pays the money to the agent from whom he bought them,—would not that be payment of a debt? *Byles*, Serjt.—There, the debt would be *due*, though not payable. Here, the language of the plea is very precise,—“*due and payable*.” JERVIS, C. J.—It clearly does not lie in the mouth of the plaintiff, who has received the money, to say that it was not payable.]

JERVIS, C. J.—I am of opinion that the rule should be made absolute to reduce the verdict by 186*l.* The fair construction of the agreement, as I read it, is, that the plaintiff was under no circumstances to receive any money on account of the defendant. The construction contended for on the part of the plaintiff would introduce a refinement which the language of the instrument does not warrant. The obvious meaning of the clause is this,—“I doubt your solvency, and, though I am content to employ you as my agent, I will not trust you to receive money for me.” As to the rest, many cases might be conceived where the money under circumstances like these would be due and payable.

The plaintiff receives it as money due and payable to the defendant, and accounts for it as such. The debtors do not raise the objection; and it seems to me that the plaintiff cannot be *allowed to do so. I think the plea was substantially proved. [*727]

CRESSWELL, J.—I am of the same opinion. The fair meaning of the agreement is as my Lord has stated. It may be a hard case upon the plaintiff; and I regret that he has been induced to enter into such a contract. But we can only deal with it as we find it.

WILLIAMS, J.—I am of the same opinion, though I must say I arrive at this conclusion with much regret. The parties by the agreement, in the first place, provide that under no pretence whatsoever shall Bray contract any debt in the name of Chandler; and then the clause goes on, “or be considered as his agent to receive any money on his account.” I think it impossible to construe that otherwise than as an absolute prohibition against the receipt of money on any account or pretence whatever for the defendant. As to proof of the plea, I do not assent to the proposition, that, in all cases, an agent who receives money on account of his principal, is estopped from saying it was not due. The *prima facie* presumption, however, is, that the money was due and payable; and there is nothing in the circumstances to rebut that presumption.

WILLES, J., said nothing.

Rule absolute to reduce the verdict to 14*l*.

***JOHNSON v. GOSLETT and Others. May 26. [*728**

The rule which entitles a subscriber to a scheme which proves abortive to recover back his deposit, applies to the case of a company established for the working of a mine upon the cost-book principle.

Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l*. each, to be paid up on allotment; and stating that the money was to be paid to Messrs. L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of 50 shares, and paid 50*l*. to the bankers, who gave him a receipt describing that sum as having been received by them for the company. The plaintiff afterwards discovering that only 4720 shares had been allotted, and that the deposits had been paid upon 685 shares only, brought an action against the directors to recover back his deposit, on the ground of failure of consideration:—Held, that, although the account in the books of the bankers was kept in the names of five of the directors only, the whole seven were liable.

A. sued B., C., D., E., F., G., and H., in an action of contract: H. suffered judgment by default; and the evidence failed as against F. and G.:—Held, that it was competent to the judge at *Nisi Prius* to amend the record, under the 37th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, by striking out the names of F. and G., and a proper case for the exercise of his discretion.

THIS was an action brought by the plaintiff against William Goslett, William Holgate, Henry Johns, Samuel Kingchurch, John Peters, Thomas Willingale, and Samuel Weatherley, for money alleged to have been

received by them for his use, and for money due to him from them on accounts stated.

The defendants Goslett, Holgate, Kingchurch, Peters, Willingale, and Weatherley pleaded never indebted.

The defendant Johns suffered judgment by default.

The circumstances out of which the action arose were as follows:—One George Batters, a stock-broker, having obtained a lease for twenty-one years of a mine in Cornwall called the Perran Wheal Alfred mine, sold one-sixteenth share therein to each of twelve persons, among whom were the defendants, for 50*l.* a share, reserving to himself four-sixteenths. Batters and the other shareholders, at a cost of about 1000*l.*, erected machinery in and about the mine, and carried on the workings for three months. They then,—all debts being paid, as well as the 1000*l.* for the machinery,—proposed to form a company to work the mine upon the cost-book system, and agreed to the following resolutions:—

*729] “Perran Wheal Alfred copper and lead mine, Perranzabuloe, Cornwall.

“At a preliminary meeting of gentlemen desirous of forming a company for the prosecution of mining operations in Cornwall, and for entering upon the purchase of a certain mining sett called Perran Wheal Alfred, at Perranzabuloe, county of Cornwall, held at, &c., on Tuesday, the 22d of March, 1853, present, &c., &c., Captain Hooper’s report on the mine was read, as follows,—(setting out the report).

“Resolved, that the report be received as satisfactory, and entered in the minutes accordingly.

“Mr. Batters, on the part of the lessors, stated that the sum required by them for the sale of their estate and interest in the Perran Wheal Alfred mine was 6000*l.*, to be paid to them in shares of 1*l.* each, in the following manner, viz. 4500 shares on allotment, and the remaining 1500 shares to be left in the hands of the directors until the mine shall have been brought into a dividend-paying state: whereupon it was resolved that Mr. Batters’s proposal and offer be accepted by the following gentlemen, who have consented to become directors of a company to be formed on the cost-book system for the purpose of working the said mine, viz. (here followed the names of the seven defendants), and who are hereby elected accordingly.

“Resolved also, that (certain persons named) be appointed respectively secretary, managing agent of the mine, and surgeon.

“*That Sir John W. Lubbock & Co. be appointed the bankers of the company, with whom an account is to be opened in the names of the committee, and that all moneys be paid in to that account.*”

After certain other resolutions, a prospectus was proposed and agreed to, and afterwards published. This prospectus described the mine as

"Held under lease for *twenty-one years, at one-eighteenth royalty. To be conducted on the cost-book principle. Capital [*730 12,000*l.* in 12,000 shares of 1*l.* each, *to be paid up on allotment.*" It then named the defendants as the directors and managing committee, Sir John Lubbock & Co. as the bankers, and certain others as officers of the company, and described the object of its formation.

Certain rules and regulations, which were to form the basis upon which the operations of the company were to be managed, were then agreed to. The more material of these rules were as follows:—

"1. The several persons whose names are for the time being entered as shareholders in the cost-book shall be partners or shareholders in a mining company formed or established for the purpose of opening and working certain mines now called or known by the name of the Perran Wheal Alfred copper and lead mines, in the parish of Perranzabuloe, in the county of Cornwall, and all other metals upon or under certain lands known by the name of Perran Wheal Alfred, &c., which are held for the term of twenty-one years from, &c., under a lease granted by, &c., to, &c., as trustees for the company, and for converting, manufacturing, selling, and disposing of the produce of such mines.

"2. The name or style of the said company shall be 'The Perran Wheal Alfred Mining Company.'

"4. The capital of the company shall be 12,000 parts or shares of 1*l.* each, of which 6000 shall be allotted and vested to and in the former proprietors of the mine, as and for their interest therein, that is to say,

"5. The trustees of the said lease shall, when and if required by the directors, execute a deed declaring that they hold the said mine under and by virtue of such lease as trustees for the benefit of the shareholders in the said company according to their respective shares and interests therein; and, if any or either of the said *trustees, or any future [*731 trustees, shall resign, or die, or become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning, or dying, or becoming incapable or unwilling to act as aforesaid; and the said premises shall be forthwith assigned to and vested in the said new trustee or trustees jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company.

"6. The company is formed, and the business thereof shall be conducted and carried on, on the cost-book principle, subject nevertheless to such provisions as are herein contained.

"8. A committee of management, consisting of — members, hereafter called directors, shall be appointed, and William Goslett, William Holgate, Henry Johns, Samuel Kingchurch, John Peters, Thomas Willingale, and Samuel Weatherley, shall be the present directors of the said company: and the said William Goslett shall be the chairman of

the said directors at their first meeting: and, at every succeeding meeting, every other director shall, in turn or rotation according to the order in which his name stands in the before-mentioned list (as the case may be), be and act as chairman; and if at any meeting the director next in rotation shall not be present, then such one of the directors as would be next in rotation if all the preceding directors had served the office of chairman, shall be and act as the chairman of such meeting."

Rule 9 provided for the qualification of directors.

"10. In order to constitute a board of directors, there shall be three directors at least present.

"12. Sir J. W. Lubbock & Co. for the time being shall be the bankers *732] of the said company; but the *directors may from time to time, as and when they shall in their absolute discretion think proper, change the bankers of the said company.

"13. The directors shall meet once a month, or oftener if they shall think fit and proper, for the purpose of superintending the affairs and concerns of the said company; and they shall have full power at any meeting or meetings to adopt any resolution they may think necessary for the benefit of the said company: and the purser and other officers of the said company shall be subject to their discretion and control, and shall be liable to be removed from the offices which they hold in the said company at the discretion of the directors, who may appoint other persons to supply the places of those who may be so removed or may have resigned.

"19. All payments due from shareholders shall be made to the bankers for the time being of the said company in London; and all moneys and securities for money belonging to the said company shall be paid into or deposited in the hands of the said bankers *to the account of the directors of the said company* for the time being; and all payments for and on behalf of the said company exceeding 5*l.* shall be paid by checks on such bankers; and all checks for money shall be signed by at least two directors, and countersigned by the secretary; and no such check shall be signed except at a meeting of directors.

"23. The shareholders shall be at liberty at reasonable times to inspect the cost-book.

"24. No person whose name shall not be duly entered in the cost-book as a proprietor shall have any legal right or interest in the said mines or other property of the company; and, after any shareholder shall have signed his or her name and address in the cost-book of the company, he or she shall be at liberty to sell and transfer his or her *733] share or shares, or any of them, to *any person or persons, at his or their absolute discretion, and without requiring any authority or consent from or by the other shareholders, or any of them: but no such sale or transfer shall be effectual for the purpose of releasing the transferror from his or her liability to the said company, unless the

transfer shall be made in writing under his or her hand, and shall be accompanied by an undertaking in writing by the transferee, under his or her hand, to be bound by the rules and regulations of the said company, and unless such transfer and undertaking shall be delivered to the purser of the said company, or left at the office of the said company, within one calendar month from the date of the said transfer and undertaking, for entry in the cost-book.

"25. Every shareholder shall be at liberty, on giving notice in writing to the purser for entry in the cost-book, and on forfeiture of all moneys paid upon his or her shares, to relinquish such shares in the said company; and thenceforth he or she shall cease to have any interest in and be freed from all future liability in respect of the said company: provided that no such relinquishment shall be of any effect, unless and until the shareholder so relinquishing his or her shares shall have satisfied all his or her then liabilities to or in respect of the said company.

"26. At any ordinary or special general meeting, the shareholders present at such meeting may order the capital of the company to be increased, either by the issue of more shares, or by making a call on the 12,000 shares already issued; provided it be stated in the notice convening such meeting that it will be proposed to increase the capital of the company: and at such meeting all such rules and regulations may be made for the payment of such calls, and for the forfeiture or otherwise of shares on which calls are not paid, or otherwise in *reference thereto, as [734 the shareholders shall at such meeting deem proper and expedient."

The 27th and last rule provided for the dissolution of the company.

The prospectus having been issued, applications were made for shares to the extent of 7561, and 4720 were allotted; but of these the money was paid upon 685 only; and with this sum the directors commenced working the mine.

Amongst others, the plaintiff, on the 1st of April, 1853, applied for 100 shares, and obtained an allotment of 50, for which he paid 50*l.* to the company's account at Lubbock's, a receipt being given to him as for money received on account of the company. The form of application signed by him was as follows:—

"To the committee of directors of the Perran Wheal Alfred Mining Company.

"Gentlemen,—Be pleased to allot me one hundred shares in this company; and I undertake to accept the same, or any less number you may allot me, according to the rules and regulations of the cost-book, and to pay the deposit thereon."

On the 4th of September, 1854, a meeting of shareholders was held, at which it was resolved that the working of the mine should be discontinued, and the machinery sold for the liquidation of the debts; and subsequently the sale took place.

The present action was brought to recover back the deposit paid by the plaintiff, on the ground that he had not by agreeing to become a shareholder in a company with a capital of 12,000*l.* consented to the application of his money to the working of a concern provided with a capital of little more than a twentieth part of that amount.

On the part of the defendants it was contended, that the doctrine as *735] to abortive schemes was inapplicable to *associations like this for the working of a mine on the cost-book principle: and a witness was called who stated that it was usual, in the case of a cost-book mine, to commence working as soon as the entire proposed capital was *subscribed*, and before it was all paid up.

The account in the bankers' book appeared to have been opened in the names of *five only* of the defendants, viz., Kingchurch, Holgate, Johns, Peters, and Goslett; whereupon it was objected on the part of the defendants, that the plaintiff had failed to show, as he was bound to do, that the money had come to the hands of all the parties sought by the action to be charged.

The plaintiff's counsel proposed to amend, by striking out the names of Willingale and Weatherley, under the 37th section of the Common Law Amendment Act, 1852, 15 & 16 Vict. c. 76.(a)

To this it was objected, on the part of the defendants, that if the record were amended as prayed, the defendant Johns, who had suffered judgment by default, might say that such amendment would alter his position, by making him confess a judgment in an action in which he had four co-defendants only, instead of six.

*736] *Jervis, C. J., before whom the cause was tried at the sittings in London after last Hilary Term, ruled that there was sufficient evidence of the money having come to the hands of all the defendants, and that the circumstance of this being the case of a cost-book mine made no difference as to the plaintiff's right to recover back his deposit as upon a failure of consideration; and he declined to amend. A verdict was accordingly found for the plaintiff for 50*l.*, leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that his Lordship's ruling was erroneous.

Byles, Serjt., in Easter Term, accordingly obtained a rule nisi, on the ground, "that, in the case of a cost-book company, the plaintiff is not entitled to recover the price of his shares or his deposit, notwith-

(a) Which enacts that "it shall and may be lawful for the court or a judge in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge by whom such amendment is made shall think proper; and, in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore [a. 35] directed to be amended, and upon such terms as the court or judge or other presiding officer by whom such amendment is made shall think proper."

standing that all the shares had not been subscribed for; and that there was no evidence against the defendants Willingale and Weatherley." He submitted, that, coupled with the evidence that it was customary in these cases to go on working the mine with less than the full amount of capital contemplated, the circumstance of this being the case of a cost-book mine took it altogether out of the ordinary rule under which a subscriber to an abortive scheme was held entitled to recover back his deposit. [WILLIAMS, J.—The point was recently under discussion in the Exchequer; and Parke, B., inclined to think that the rule did not apply in such a case.] Then, he submitted that the proposed amendment was not warranted by the statute, and that it could only, by analogy to the 35th section, be made *with the consent of the person or persons to be so struck out*. [CROWDER, J., referred to *Robson v. Doyle*, 3 Ellis & B. 396 (E. C. L. R. vol. 77). CRESSWELL, J.—In a case before me at York,—*Greaves v. Humfries*, 4 Ellis & B. 851 (E. C. L. R. vol. 82),—in an action against the defendants upon an attorney's bill, it appearing that there was a retainer *only by one of the defendants, I struck out the name of the other defendant [*737 (who had suffered judgment by default), and the court held that I did right.]

Watson and J. Brown now showed cause.—The defendants are all equally liable, and there is no necessity for any amendment. The prospectus was issued by the authority of *all*, and the bankers received the money as the agents of *all*. The plaintiff became a subscriber subject to the terms and conditions contained in the cost-book rules,—one of which was, that the capital should consist of 12,000*l.*: there being no provision in those rules empowering the company to commence until all had been subscribed. In *Hutton v. Thompson*, 3 House of Lords Cases, 161, it was held that an allottee of shares, who has paid his deposit, but has neither signed the subscribers' agreement nor the parliamentary contract, does not by his letter of application for shares, and by paying the deposits thereon, become a "member" of the company, or a "contributory" within the meaning of the Joint Stock Companies Winding-up Acts, 7 & 8 Vict. c. 111, and 11 & 12 Vict. c. 45. [*Byles*, Serjt.—That will not be disputed.] It was attempted at the trial to make out an usage, in the case of a cost-book mine, to commence working before the entire capital was subscribed. But that attempt altogether failed; the witness who was called stating that it was the practice to begin as soon as the entire capital was *subscribed*, but before it was all *paid up*. [WILLES, J.—In *Barstow v. Reynolds*, which was the case referred to by my Brother Williams on the motion, a new trial was granted, in order that it might be ascertained what was the cost-book rule upon this subject: see 24 Law Times, 83, 118, 278.] Wordsworth, who professes to give the characteristics of cost-book mines, is altogether silent on this matter. Then it is said there was

*738] no evidence *against the defendants Willingale and Weatherley, and that those only of the directors are responsible in whose names the banking-account was kept. The money, however, was paid into Lubbock's in pursuance of the directions contained in the prospectus and the rules and regulations. Is it the less money had and received by the persons at whose request and upon whose account the plaintiff paid it in, because they think fit to keep the account at their bankers in the names of five of their body only? *Watson v. Earl Charlemont*, 12 Q. B. 856 (E. C. L. R. vol. 64), which will probably be relied on for the defendants, is materially distinguishable. The receipt was different in form from that given here: the plaintiff had notice that he was paying money to the trustees,—a body different from the committee of management. If it be necessary, the record may now be amended, by striking out the names of Willingale and Weatherley. The objection is, that Johns has suffered judgment by default. He cannot be put in a better position than if he had appeared. In *Greaves v. Humfries*, 4 Ellis & B. 851 (E. C. L. R. vol. 82), in an action of contract against two defendants, A. and B., A. suffered judgment by default, and B. pleaded never indebted, on which issue was joined. On the trial, it appeared by the evidence that B., the defendant who pleaded never indebted, was solely liable, A., the defendant who had allowed judgment to go by default, not being a contracting party. B.'s counsel claimed a nonsuit. The judge ordered the record to be amended by striking out the name of the defendant A., and directed a verdict against B., subject to leave to move to enter a nonsuit, if the court should think that the amendment ought not to have been made. On motion, the court held that the amendment was properly made. And Crompton, J., said: "I find no words (in s. 37) expressing a restriction in cases where there has been a judgment by default. We should not introduce into

*739] the statute a restriction *which the legislature have not expressed, and which, I believe, they never contemplated." [JERVIS, C. J.—That is not quite this case. Here, Johns may say, "I confessed myself liable to you jointly with six others; you now seek to fix me with a liability jointly with four. That may prejudice me when I come to seek contribution from my co-defendants." My Brother Willes suggests to me that the circumstance of the plaintiff asking to strike out two of the defendants, does not prove that Johns was not liable jointly with the six, only that the plaintiff was unable to establish it. It in truth leaves Johns just where he was.] No doubt, the party who sues his co-defendants for contribution, is assisted in his action by putting in the judgment. But that is all. [WILLIAMS, J.—I should think the amendment might be made, if the judge thought it a proper case, just as he might amend any variance.]

Byles, Serjt., and *H. J. Hodgson*, in support of the rule.—1. This is not a case in which the ordinary rule applies. 2. If it does, all the six

defendants are not shown to be liable, and the Lord Chief Justice had no power to amend.

1. It may be conceded, that, where money is paid for the purchase of shares in an undertaking which proves abortive, the consideration for the payment fails, and the money may be recovered back: but it is submitted, that this is not an undertaking to which that rule applies; for, the 63d section of the act for the regulation of joint stock companies, 7 & 8 Vict. c. 110, expressly provides "that nothing in that act contained shall extend or be construed to extend to any partnership formed for the working of mines, minerals, and quarries, of what nature soever, on the principle commonly called the cost-book principle." [WILLES, J.—*Formed for the working, &c.*] This is a partnership actually formed: the mine has *been worked. If this concern had been wound up under the 7 & 8 Vict. c. 111, and 11 & 12 [*740 Vict. c. 45, the plaintiff could not have said that he was not liable as a contributory. That was decided in a recent case of *Re The Great Cambrian Mining and Quarrying Company, Ex parte Hawkins*, 25 Law Journ. Chan. 221. There, by the prospectus of a proposed mining company, the capital was advertised to consist of 30,000*l.*, to be paid up in full on allotment; and the printed form of application for shares contained an undertaking by the applicant to conform to the rules of the company. Mr. Hawkins applied verbally for shares in the company, which were allotted to him, and he received the scrip-certificates. The certificates contained a statement that the shares were to be held subject to the rules and regulations of the company, one of which was, that no person should be recognised as an adventurer until he had signed the rules. Mr. Hawkins never signed the rules, and never interfered with the management of the company. Proceedings having been taken under the winding-up acts,—it was held, that Mr. Hawkins was liable as a contributory. Vice-Chancellor Wood, in giving judgment, said: "The case is concluded by the authorities. In the absence of fraud, and of any such announcement in the prospectus as that the directors should not have an opportunity of saying when they will commence business, I do not see how Mr. Hawkins can say he has been deceived with respect to the nature of the company. There is no statement, or even implication, that no business will be carried on before the whole 30,000*l.* is subscribed for. By the rules and regulations, the capital of the company is to be 30,000*l.*, in 30,000 shares of 1*l.* each, and a person is to be entitled on signing them to a certificate for his shares. The company is then constituted." "If, on getting his certificate, he had said, 'This is not the sort of company that I intended to *belong to,' then there would have been a *locus poenitentiae*: but [*741 he does not do that; all he does, is, a year afterwards he brings his action against the directors for the return of his deposit. Lord

Mansfield's Case(a) goes to that point. He makes no application to return the certificate; and it is too late to say he can now escape from the rules and regulations. The case is clearly within Yelland's(b) and Lord Mansfield's Cases. He has become a member of the company, and authorized the directors to enter him as a member. According to Lord Mansfield's Case, the contract is constituted between them, and he is a member of the company, and therefore a contributory." [JERVIS, C. J.—The decision of the Vice-Chancellor in that case is not rested upon the distinction which you suggest. And I must confess it seems to me to be a violation of all the authorities.] That the distinction suggested should exist, is most reasonable. The usual mode of obtaining possession of a mine, is, by a lease for a term of years, subject to a certain royalty, and reserving a right of re-entry for non-working: and the prospectus showed that this mine was being actually worked, at the time of the formation of the company, under a lease. It was essential, therefore, that the works should be commenced at once; and there was evidence that such was the usual practice. The only question on this part of the case, is, whether the plaintiff has not sanctioned the application of his money by the directors. The judgment of the Exchequer Chamber in *Watts v. Salter*, 10 C. B. 477, 518 (E. C. L. R. vol. 70), rather confirms the view of Vice-Chancellor Wood in *Re The Great Cambrian Mining and Quarrying Company*. Parke, B., there says: "The plaintiff, having executed the deed, has agreed, under his hand and seal, that the provisional directors shall do all that is therein contained; *and by that deed he is bound, unless he was induced by *742] fraud or misrepresentation to execute it. The question of fraud was not left to the jury. It has been contended, that the directors had no power under the deed to deal with any part of the money until the whole amount had been subscribed. I do not, however, agree in that construction. If such had been the plaintiff's intention, he should have taken care not to execute a deed which did not express it. No such express stipulation is to be found on the face of the deed; and none can be implied." 2. Then, assuming that this case differs in no respect from that of an ordinary joint stock company,—the bankers who received the money, received it, not as the agents of the company, or of the directors generally, but as the agents of the five individuals in whose names the account was kept. That is a ground of nonsuit: and the question is, whether it was competent to the Lord Chief Justice to amend the record by striking out the names of Willingale and Weatherley, and, if so, whether under the circumstances this was a proper case for the exercise of his discretion. If the names of Willingale and Weatherley are struck out, it would expose the defendant Johns to this difficulty:—A judgment against him and the other six defendants would have been

(a) *Ex parte The Earl of Mansfield*, 2 M'N. & G. 57.(b) *Ex parte Yelland*, 21 Law J. Chan. 852, 16 Jurist, 509.

conclusive evidence against each and every of them in an action at his suit for contribution. It may be, that he would not have allowed judgment to go by default, if he had not known that he had the security of all his co-defendants. By striking out two of them, his remedy is limited to four. The chances of Johns's escape from liability to execution at the suit of the plaintiff are thus diminished by one-third. If you seek to emerge from that difficulty, by also striking out the name of Johns, that would be making the judge at Nisi Prius strike out or set aside a *judgment*,—which he clearly has no power to do. This consequence was not pointed out in the case *of Greaves v. Humfries, 4 Ellis & B. 851 (E. C. L. R. vol. 82). Again, if Johns had originally [*743 been omitted, there might have been a plea in abatement. [WILLIAMS, J.—That argument would be equally applicable whether there was a judgment by default or not.] No doubt. [WILLES, J., referred to Taylor v. Best, 14 C. B. 487 (E. C. L. R. vol. 78).]

JERVIS, C. J.—I am of opinion that this rule should be discharged. I assume that there is nothing to distinguish this from the ordinary case, and that, if this had not been the case of a cost-book mine, the plaintiff would be entitled to recover. That being so,—as, indeed, my Brother Byles started with admitting,—the conclusion I have come to, is, that there is nothing in the case of a company formed for the working of a mine on the cost-book principle, to take it out of the ordinary rule. On the contrary, I find by the contract upon which the plaintiff was induced to part with his money, that he consented to become a member of a partnership whose capital was to consist of 12,000*l.*, in 12,000 shares of 1*l.* each; and it was no part of the bargain that he should be considered a partner in a concern with a paid up capital of 685*l.* on shares allotted or subscribed to the extent of 4720 only, and which became abortive. I repeat, I see no ground of distinction between this and the ordinary case where an allottee of shares has been held entitled to recover back his deposit on the failure of the directors to carry out the scheme. As to the second point, it seems to me to be unnecessary to amend the record by striking out the names of the defendants Willingale and Weatherley, because I think all the defendants who are sued are liable in the form in which they are sued. In the prospectus, which they all concur in issuing, they state that Sir John Lubbock & Co. are the bankers of the company, with whom an account is to be opened in the names of the committee, and that all *moneys shall be paid [*744 in to that account. They agree amongst themselves that five of their number shall be the depositaries to receive and hold the moneys for the whole seven directors, or more, as the case may be. I therefore think the whole are properly charged, and that no amendment is necessary. If it had been necessary, I think the language of the statute would have warranted us in making the amendment as prayed, even though the name of Johns, the defendant who suffered judgment by

default, should remain on the record. The object of the statute was, to extend the powers of amendment, so as to put upon the record the real parties and the real question to be tried between them. The real question here, was, to whom did the plaintiff pay his 50*l.*, and for what purpose? I am clearly of opinion that the plaintiff is entitled to recover, and that this rule should be discharged.

WILLIAMS, J.(a)—I am of the same opinion. Notwithstanding the company in question came to nothing, it would not necessarily follow that the plaintiff would be entitled to recover back his money, because it might be, that, before the company became abortive, the money had been exhausted by its application to purposes sanctioned by the plaintiff. But I cannot discover here any evidence that any expenditure whatever took place or was incurred by the directors under the authority of the plaintiff. He has a right to say, that he subscribed his money for the purpose of carrying on an adventure with a certain stipulated number of companions. It is clear, that he gave no authority to the directors to prosecute the adventure, or to incur any expense for that purpose, until that number was complete. The consideration, therefore, upon which the money was paid, has failed, and the plaintiff is entitled to *745] recover it back. I also *concur with my Lord in thinking that there was evidence in this case from which the jury might properly find that the money was received by Sir John Lubbock & Co. as the bankers of all the seven defendants. If, however, it were necessary to decide the point, I entertain a very strong opinion that it was competent to my Lord to amend the record at the trial by striking out the names of Willingale and Weatherley, if it appeared to him to be a proper case for the exercise of his discretion; and that it was not the less a proper case for amendment, because another of the defendants had suffered judgment by default. It might be, that the circumstances of the case might be such that it would be right to strike out the name of that defendant also, or to impose some other terms. But it is unnecessary to give any opinion on that, because I think there was abundant evidence of a receipt of the money by the bankers as the agents and on account of all the defendants.

WILLES, J.—I am entirely of the same opinion. With reference to the first point, I find that the judgment of the Vice-Chancellor in the case of *The Great Cambrian Mining and Quarrying Company*, 25 Law Journ. Ch. 221, was founded upon the decision in *Ex parte Earl of Mansfield*, 2 M'N. & G. 57. There, an allottee of shares paid the required deposit thereon, and received the scrip-certificates of the shares, acknowledged the receipt thereof, and was registered as a shareholder. The company commenced operations before its capital was fully subscribed, but afterwards discontinued its business as unprofitable, the scheme being neither fraudulent nor abortive. The allottee

(a) Crosswell, J., was absent.

was held to be a contributory, although he had not signed the deed of settlement, nor paid any of the calls when demanded, nor taken any part in the affairs of the company. It seems, therefore, that the question in a *court of law differs materially from that which arises [746 in equity. My Brother *Byles* will probably recollect the case of Lord Londesborough v. Mowatt, where parties, who had obtained allotments, and paid the deposits thereon, were placed upon the list of contributories, though afterwards held entitled to recover back their deposits, on the ground that they had never sanctioned the application of the money by the directors to the purpose to which they applied it. The ground upon which I rest my opinion on the second point is this:—The committee of directors issue a prospectus, in which they state that the payment of the deposits is to be made to Sir John Lubbock & Co., as the bankers of the company; and the plaintiff goes to the bankers and pays the money, getting a receipt showing that it is received by them on behalf of the directors. What the bankers do with the money is a matter of indifference to the plaintiff. If, with the consent of the directors, the bankers, for the sake of convenience, place the money to an account opened in the names of five of their body, that cannot affect the plaintiff. The moment he paid his money, it was money received by the company. Either upon the fact, therefore, of the receipt of the money by the company, or upon the ground of the representation of their agents, I am of opinion that the plaintiff is entitled to recover back this money from all the defendants. The rule, therefore, will be discharged.

JERVIS, C. J.—The plaintiff's counsel will have to exercise their discretion, in the event of an appeal, as to whether or not they will avail themselves of the power of amendment which this court thinks exists, and ought to be exercised, if necessary; inasmuch as the power of amendment does not go to the court of appeal.

*WILLES, J.—If, upon consideration, the plaintiff's counsel think it safer to amend by striking out the names of Willingale [747 and Weatherley, they are at liberty to do so, because we think it is a case for amendment, though we do not think any amendment necessary.

Rule discharged.

GORDON v. WHITEHOUSE. *June 5.*

By agreement between A. and B. it was agreed that B. should buy of A. a certain plant, materials, and tools, "at a valuation to be made by A. and a person to be appointed by B.," and that B. should pay for the same by a bill for 150*l.* at two months from the valuation, and by another bill for the balance of the valuation at three months after date.

Under this agreement, B. was let into possession, and A. and one J. (who represented B.) met and proceeded to value, having a list of the articles to be valued, as to all of which, except certain timber, the prices were finally agreed upon; but, as to the timber, the price per foot and the superficial measurement only were agreed upon, the calculation of the cubical contents and the carrying out the amount being left to be filled in by B.'s foreman. A. and J. never met again, and did not agree upon the sum total; but B. (after action brought for it) paid the 150*l.* :—

Held, sufficient evidence to warrant the jury in finding that a valuation had been made by A. and J.

THE declaration stated, that the plaintiff and defendant agreed that the plaintiff should sell to the defendant, and that the defendant should buy of the plaintiff, certain plant, materials, and tools, at a valuation to be made by the plaintiff and a person appointed by the defendant, and that the defendant should pay for the same by a bill of exchange for 150*l.*, drawn by the defendant upon and accepted by a customer of the defendant, at not exceeding two months from the said valuation, and by another bill of exchange for the balance of the said valuation, accepted by the defendant, and payable at three months after date: Averment, that, in pursuance of the said agreement, the plaintiff did sell and deliver to the defendant, and the defendant bought and received of the plaintiff the said plant, materials, and tools, upon the terms aforesaid, and that a valuation thereof was duly made pursuant to the said agreement, of which, and the amount thereof, the defendant had *748] due notice; and *that, although the said sum of 150*l.* had been paid, and all conditions precedent, necessary matters and things, on the part of the plaintiff, so as to entitle him to have the bill accepted by the defendant for the balance of the said valuation, had been performed, and a reasonable time for accepting and giving such bill had elapsed before this suit: yet the defendant had not accepted or given a bill of exchange for the balance of the said valuation, but had refused so to do, and had not paid the said balance.

The defendant pleaded,—first, that he did not agree as alleged,—secondly, that no such valuation as alleged was made,—thirdly, that no such bill of exchange as in the declaration secondly mentioned was presented to the defendant for acceptance, and that he was not requested to accept such bill of exchange,—fourthly, that the plaintiff theretofore sued the defendant in the Court of Exchequer of Pleas, at Westminster, in an action in respect of the same identical cause of action as that in the present declaration mentioned, and that such proceedings were thereon had, that, afterwards, and after the commencement of this suit, by the judgment of the said court it was considered

that the plaintiff should be in mercy for his claim in the said action, so far as the same related to the said cause of action in the said declaration contained, and that the defendant should go thereof without day, as by the record and proceedings thereof remaining in the said court appeared.

The plaintiff joined issue on the first, second, and third pleas, and replied to the fourth, that the said action in the fourth plea mentioned was not brought, nor was the defendant sued therein, in respect of the same cause of action as that in the declaration mentioned, as in the said fourth plea alleged; whereupon issue was joined.

The cause was tried before Jervis, C. J., at the sittings *in London after last Hilary Term. The plaintiff was a civil [*749 engineer and contractor; the defendant an iron-master and contractor carrying on a large business at Sedgely, in Staffordshire. In the early part of 1855, the defendant had a contract with the commissioners of public works for the erection of the piers of a bridge at Chelsea. One Deeley, a sub-contractor under the defendant, having failed, a negotiation took place between him and the plaintiff for the erection of the castings, which resulted in the agreement declared upon.

The plant, tools, and other things which were to be valued, consisted, amongst other things, of a large quantity of timber in bulk. The plaintiff and one Jones met on the ground for the purpose of making the valuation, having a list of the various articles, opposite to which the plaintiff put down the prices agreed on between them. As to the timber, it was agreed to be taken at a certain price per cubic foot; the superficial measurement was taken, but the exact quantities were not then ascertained, a day being appointed for the purpose of adjusting the account,—the quantities to be calculated in the mean time by one Griffiths, the defendant's foreman. The parties, however, did not meet again, but the plaintiff afterwards sent Jones the quantities as settled by Griffiths. Jones subsequently sent in his valuation, making the total 652*l.* 18*s.* 10*d.* The plaintiff made the amount 711*l.* 8*s.* 2*d.*, and on the 19th of October, 1854, he wrote to the defendant as follows:—

“Mr. Jones and I have arranged very amicably, and without the necessity of appealing to any referee. Have the goodness to send me to-morrow, if you have not done so to-day, bills for 150*l.* as agreed, on account of the plant and materials; the remainder I shall draw on you for, as arranged, as soon as Mr. Jones has completed his fair copy valuation.”

The fourth plea was waived: but the plaintiff *proposed to put in the record in the action there referred to, for the purpose of [*750 showing an admission by the defendant that a valuation had been made,—the declaration alleging a valuation to have been duly made, and that the defendant refused to deliver the bill for 150*l.* as agreed; and the

defendant pleading merely that no such bill had been presented for acceptance.

On the part of the defendant, it was objected that the record in the former action was inadmissible; and the Chief Justice so ruled.

It was then proved, that the plaintiff obtained a verdict in that action, and that the defendant paid the amount.

For the defendant it was insisted, that there was no evidence that the valuation contemplated by the agreement had taken place, and consequently that there was no ascertained balance for which he was bound to accept.

His Lordship left it to the jury to say, whether or not there had been a valuation; and they found for the plaintiff for 562*l.* 8*s.*

Hugh Hill, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. He submitted that the learned judge should not have left it to the jury to say whether there was a valuation, as the evidence distinctly proved that no valuation had been made pursuant to the contract.

Byles, Serjt., and *Lush*, now showed cause.—The question is, whether there was any evidence that a valuation was made: there can be no misdirection if there was *any* evidence to go to the jury of a valuation. The record in the former action was not offered as an estoppel, but as *751] evidence of an admission by the defendant *that a valuation had been made. [CRESSWELL, J.—It was an admission for the purpose of that suit only. WILLES, J.—Parke, B., lays down the rule in these terms, in *Boileau v. Rutlin*, 2 Exch. 665, 681,†—“It would seem that bills in equity, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive upon a different principle, and for the purpose of terminating litigation: and so are material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.” JERVIS, C. J.—There is nothing in this point.] There was no misdirection, and the verdict was fully justified by the evidence. The agreement was, that the plant, tools, and materials should be valued by the plaintiff and by a person named on the part of the defendant. This

person (Jones) and the plaintiff met, and, having agreed upon a valuation of the plant and tools, proceeded to value the timber. They ascertained its measurement in superficial feet, and the price per foot, leaving it for the defendant's clerk or foreman to calculate the cubical contents and carry out the figures. If more were necessary to satisfy the terms of the agreement, it may be contended that the correspondence *shows that the doing more was dispensed with. It was, under [*752 all the circumstances, for the jury to say whether that which was done was the valuation or appraisal which the parties intended. And they came to the only conclusion that could properly be come to upon the evidence.

Hugh Hill and *Petersdorff*, in support of the rule.—In order to ascertain the amount to be drawn for, it was necessary that the prices as well as the quantities of the timber should be agreed on. It appears, that, for this purpose, the plaintiff and Jones met and went through a list of the plant and tools, which had previously been made out by the clerk of the works, and affixed a price to each article; and that, when they came to the timber, though they agreed as to the superficial measurement and the price per foot, the number of feet to be charged for was not agreed, and has not to this moment been agreed. The only valuation to which Jones assented made the total 652*l.* 18*s.* 10*d.*; whereas the plaintiff claimed, and the verdict passed upon the assumption that the correct valuation amounted to 711*l.* 3*s.* 2*d.* This clearly was not what the parties stipulated for. The case is analogous to that of a submission to arbitration: and it has been held, that, where a matter is referred to the award of three arbitrators, or any two, and two only sign, at different times and places, what purports to be an award, this is not in pursuance of the submission: *Wade v. Dowling*, 4 *Ellis & B.* 44 (*E. C. L. R.* vol. 82). *Coleridge, J.*, there says,—“The parties say, ‘We refer this matter to three arbitrators; we wish to have the opinion of all three, at any rate the opinion of two, up to the last moment. It is well pointed out in *Stalworth v. Inns*, 13 *M. & W.* 469,† 2 *D. & L.* 428, that, up to the last moment, something may occur to change the opinion of the arbitrator. Is, then, this condition carried out *when the arbitrators execute at different places and times? [*753 I think not.” *Wightman, J.*, says,—“The submission is, to the award of any two or more who make the award before a certain time. One makes at one time, another at another. When is there the signature of the two? A week or a fortnight may intervene between the signatures; yet clearly there is not the signature of the two till both have signed; nor till then is there the final signature of one, since matters may occur in the interval which may alter his view. The parties have a right to the joint judgment of the two, exercised upon consideration up to the last moment.” And *Erle, J.*, adds,—“This is not the award for which the submission stipulates. That was to be an award

made upon the joint judgment of arbitrators considering all that they had heard up to the giving of their judgment." The rule there laid down was adopted and acted upon by this court in *Peterson v. Eyre*, 15 C. B. 724 (E. C. L. R. vol. 80). So, here, the agreement is, that the valuation shall be the result of the joint judgment of the plaintiff and Jones: until they have finally agreed, there is no valuation binding upon either party. [WILLIAMS, J.—Id certum est quod certum reddi potest. The measurement and the price per foot were agreed upon; nothing remained to be done but a mere matter of figures.] The materials for calculation were ascertained, but not the result. Enough at all events remained to be done to occasion a serious discrepancy in the result come to by the parties. The defendant has not had the benefit of Jones's judgment, which he stipulated for: there is, therefore, the absence of that concurrence of mind between the plaintiff and Jones which was an essential condition precedent to the defendant's liability to give his acceptance for the balance.

*754] CRESSWELL, J.—I am of opinion that this rule should *be discharged. It appears that the two parties to the action had agreed that the defendant should buy of the plaintiff certain plant, materials, and tools, at a valuation to be made by the plaintiff and a person appointed by the defendant, and that the defendant should pay for the same by a bill of exchange for 150*l.*, drawn by the defendant upon and accepted by a customer of the defendant at two months from such valuation, and by another bill for the balance of the valuation, accepted by the defendant, and payable at three months after date. By the terms of this agreement, no payment would become due until the valuation was made. The 150*l.* had been paid,—after action, it is true; but that is not material here. The substantial answer pleaded here, is, that no such valuation as alleged was made; and it is insisted that the defendant was not bound to accept the second bill, because he cannot tell the amount for which he was bound to accept. The objection is one of the strictest nature: and we ought not to disturb the verdict if there is *any* evidence upon which it may be sustained. I am of opinion that the payment of the first bill was some evidence of a valuation having been made. Suppose the record in the former action had not been put in: assume that the defendant agreed to pay the amount by two instalments after a valuation,—when one instalment is shown to have been paid, is not that evidence of an assent to the valuation? I think it is. Moreover, I think the valuation in this case was sufficiently made. It appears that the plaintiff and the defendant's valuer met, and agreed upon the prices of each article to be valued, except the timber; and, as to that, it appears that they agreed upon the superficial measurement and the price per foot. That would give them the means of ascertaining to a mathematical certainty the number of cubic feet to be paid for, and

would, I think, entitle the plaintiff to tender for acceptance a *bill for the correct amount of the balance. If the defendant [*755 could have shown that the plaintiff had erroneously computed the quantities, and had not tendered a bill for the right amount, he might have pleaded it. But that is not pretended. The case of *Waddle v. Downman*, 12 M. & W. 562,† affords a good illustration. There, an award was upheld by the court as sufficiently certain, under these circumstances:—It was an action of debt for work and labour, goods sold, &c.; to which the defendant pleaded *nunquam indebitatus*, payment, and a set-off. The cause and all matters in difference were referred by order of *Nisi Prius*; and, after providing for the verdict, the order provided that the arbitrator should also by his award “ascertain what sum of money, if any, he should find to be due from either or any of the said parties to the other or others of them, in respect to any of the said other matters in difference.” It appeared that the plaintiff had supplied the defendant with certain cast-iron machinery called a “cam-ring and shaft,” for which the defendant declined to pay, alleging them to be defective and insufficient. At the last meeting before the arbitrator, it was agreed between the parties, that, if he should think fit that the cam-ring and shaft ought not to be charged, he was to allow the plaintiffs *the value of them at the market-price of pig-iron*, as they had been retained by, and were still in the possession of, the defendant. The arbitrator made his award in the following terms,—“I award and determine that the plaintiffs are not entitled to recover any debt or damages in the said cause against the defendant, and that no sum of money is due from either of the parties to the other of them in respect to any of the other matters in difference mentioned in the said rule or order, except that I award that the defendant do on demand pay to the plaintiffs, for the defective shaft and cam-ring delivered to the defendant by the plaintiffs, and now on the defendant’s *premises, such sum of money as the [*756 same amounts to according to the present market-price of pig-iron:” and it was held that the award was not bad for uncertainty in omitting to name the time and market at which the price of the iron was to be ascertained. There the parties had not gone so far as they have here; the cam-ring and shaft had not been weighed; and there was an element of strife (*viz.* the market price of pig-iron) which does not exist in this case: yet the court held the award sufficiently certain. That, as it seems to me, was a stronger application of the maxim “*Id certum est quod certum reddi potest*,” than we are called upon to make here.

WILLIAMS, J.—I am of the same opinion, and should not have thought it necessary to add anything to what has been said by my Brother Creswell, but for an expression used by him which may be misunderstood. I do not agree in the suggestion that has been made by counsel, that this case is to be governed by the rule which prevails in cases of valua-

tion by arbitrators. An arbitrator is bound to pursue the submission in every material point. The same principle does not apply to a case of this sort. Here we are to look to the substance: and I think there was abundant evidence that the valuation did take place.

CRESSWELL, J.—I referred to the case of *Waddle v. Downman*, not as an authority which was to govern our decision upon this occasion, but merely as an instance of the application of the principle.

WILLES, J., concurred.

JERVIS, C. J.—I must confess I felt some difficulty at the trial; and
 *757] my doubts are not entirely removed now. *I rejoice, however, that my learned Brothers have been able to arrive at the conclusion they have come to. The defence was not one which could be commended.
 Rule discharged.

HIRSCH and Others v. COATES.

FOUNTAIN and Others, Garnishees. *June 12.*

An order upon a garnishee, under the 63d section of the Common Law Procedure Act, 1854, 17 and 18 Vict. c. 125, has no operation upon debts of which the judgment-debtor has already divested himself by assignment.

THIS was an action upon a bill of exchange for 256*l.* 19*s.*, against the defendant as acceptor. On the 19th of March last a writ was issued under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), upon which judgment was signed against the defendant on the 8d of April.

On the 1st of April, the defendant by deed assigned to one Richard Hall, his executors, &c., "all and singular the household goods and furniture, plate, linen, china, stock in trade, ready money, *debts and securities for money*, books of account, bonds, bills, and all and every other the personal estate and effects whatsoever and wheresoever, and of what nature, kind, or sort soever, belonging, due, or owing to him," in trust for the benefit of all his creditors who should execute that deed.

Hall took possession of the defendant's effects under this assignment, and gave notice thereof to the plaintiffs on the 3d of April. On the 1st of May the defendant was served with a summons calling upon him to show cause why he should not be examined before one of the masters, or such other person as the judge should appoint, touching any and what debts were owing to him,—under the Common Law Procedure Act,
 *758] 1854, 17 & 18 Vict. *c. 125, s. 60. This summons came on for hearing before Williams, J., on the 5th of May, when the following order was made:—

"Upon reading, &c., I do order that the judgment-debtor do attend, and that he be orally examined as to any and what debts are owing to him, before Mr. John England, of Hull, solicitor, at such time and place

as he may appoint; and that the said judgment-debtor do produce such of his books as are in his possession or control before the said examiner at the time of such examination: And I reserve all question of costs."

The defendant, in pursuance of that order, attended before Mr. England, and stated that he had no debts owing to him, inasmuch as he had assigned them to Hall for the benefit of his creditors.

On the 14th of May the following order was made by Crowder, J., at the instance of the plaintiffs:—

"Upon hearing the attorneys or agents for the judgment-creditors, and upon reading the affidavit of William Cooke, I do order that all debts due and owing, or accruing due, from the above-named garnishees to the above-named judgment-debtor be attached to answer a judgment recovered against the above-named judgment-debtor on the 3d of April, 1856, by the above-named judgment-creditors, in the Court of Common Pleas, for 260*l.* 19*s.*, debt and costs. I further order, that the above-named garnishees, their attorney or agent, attend me at my Chambers, &c., on Thursday, the 22d day of May, instant, at 3 of the clock in the afternoon, to show cause why they should not pay the judgment-creditors the debt due from them to the judgment-debtor, or so much thereof as may be sufficient to satisfy the said judgment-debt."

The parties accordingly attended before Crowder, J., on the 22d of May, when, the garnishees admitting that they were indebted to the defendant in the sum of *8*l.* 5*s.* 8*d.*, but setting up the assignment as an answer to the application, the learned judge gave [759] them the option of taking an issue to try the question as to the right of the plaintiffs to attach the debt, or of paying the amount, and adjourned the summons until the 26th. The parties again attended before Crowder, J., on that day, when, the attorney for the garnishees declining to take an issue as proposed, the learned judge made an order upon them for payment of the debt of 8*l.* 5*s.* 8*d.* to the judgment-creditors.

Unthank, on a former day in this term, obtained a rule, on behalf of the garnishees, calling upon the plaintiffs to show cause why the orders of Crowder, J., should not be rescinded, and why they should not pay to them or their attorneys the costs of and occasioned by the application, on the ground, that, at the time that order was made, there was no debt due from them to the defendant which was susceptible of attachment. [WILLES, J., referred to *Watts v. Porter*, 3 E. & B. 748 (E. C. L. R. vol. 77).](a)

Brewer now showed cause.—The question turns upon the 60th and 61st sections of the 17 & 18 Vict. c. 125. The 60th section enacts, that "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment-debtor should be orally examined as to any

(a) *Unthank* also objected, that the principal affidavit on which the order had been obtained was made by the clerk to the plaintiffs' attorney, and not, as required by s. 61, by "the plaintiffs or their attorney."

and what debts are owing to him, before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment-debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act." And the 61st section enacts, that "it shall be lawful for a judge, upon the ex parte application of such judgment-creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment-debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment-creditor the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the judgment-debt." [JERVIS, C. J.—The question is, whether an assignment of the debt takes it out of that clause.] The only question is as to the second order, of the 26th of May (that of the 14th being clearly regular); and that order was made by the learned judge after he had been informed of the assignment, and was, it is submitted, warranted by the 61st section of the Common Law Procedure Act, 1854. The garnishees declined to try an issue. [JERVIS, C. J.—The 62d section provides that "service of an order that debts due or accruing to the judgment-debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands." If that means, that the order gives the judgment-creditor a right to receive the proceeds, that can hardly apply where the debt has been previously assigned. *WILLIAMS, J., referred to *Westoby v. Day*, 2 E. & B. 605 (E. C. L. R. 75).] It is submitted that the debt, though assigned, is attachable under s. 61. [CRESSWELL, J.—Why should we give a larger meaning to the words of this act, than to the assignment under a bankruptcy? That, it is well known, conveys only debts which the bankrupt was legally and equitably entitled to receive.] The first order of Crowder, J., viz., that of the 14th of May, is clearly unobjectionable. The assignment may never be carried out, and the debt never paid. If the court should think the order of the 26th of May ought to be set aside, they will probably, in exercise of the discretion given them by the 67th section, make the applicant pay the costs. [JERVIS, C. J.—I do not think this is a case for costs on either side.]

Unthank, in support of his rule.—In *Kennett v. The Westminster Improvement Commissioners*, 11 Exch. 349,† the Court of Exchequer

rescinded an order of this sort under circumstances very similar to those of the present case. The Westminster Improvement Commissioners, incorporated by act of parliament for the purpose of effecting certain improvements in Westminster, were empowered to borrow money on bond, and to advance money to builders for building purposes. By the condition of these bonds, all the bond-holders were to be paid *pari passu*. The commissioners advanced a certain sum to one Mackenzie, a builder. The plaintiff sued the commissioners on one of their bonds, and they suffered judgment by default. The judgment-creditor obtained an order to attach the debt due to the commissioners from Mackenzie: and it was held, that the debt was not one to which the provision in question was applicable, inasmuch as the judgment-creditor could not enforce immediate payment of his judgment, and the effect of the garnishment would be to give him a priority *over the other bond-holders. In delivering the judgment of the court, Platt, B., there says: "The [*762 interference of the judges in these cases of attachment is discretionary. It is not every debt due to a judgment-debtor that is to be attached. The debt may be attended with circumstances which would prevent the judgment-creditor from enforcing its immediate payment, and, where such is the case, it is not a debt of the nature contemplated by this act." [JERVIS, C. J.—You are asking us to decide a complicated question on motion. The garnishees do not deny that they owe the debt. The first order is, to attach all debts: there can be nothing wrong in that, I think you ought to have a *scire facias*, so as to have the question put on the record and properly tried.] That is done only where the garnishee disputes his liability: s. 64. [CRESSWELL, J.—Are not the garnishees here disputing their liability to be called upon to pay the debt to the judgment-creditor? Possibly you might show for cause on the *scire facias* that you ought not to pay him, because, although you owed the debt to the judgment-debtor, by reason of the prior assignment it is in equity payable to another person.] Where the matter is clear, as it is here, the court will not put the parties to the useless expense of that circuitous remedy. It clearly is not every debt that is within the statute.

JERVIS, C. J.—I am of opinion that the order of the 26th of May should be set aside, but that the order of the 14th is good. The construction I put upon the statute is this:—Where a party has obtained a judgment, and there are debts owing to his judgment-debtor, he may go before a judge and obtain an *ex parte* order, under s. 61, to attach all debts (a) owing or accruing to the judgment-debtor; and that order binds all debts, and makes *ultimately available to the execution-creditor so much as may remain after satisfying all equitable [*763 claims thereon. If the debts are assigned, and the assignment swallows

(a) All debts owing or accruing from *such third person*, i. e. the person sworn to be indebted,—not all debts, generally.

up the whole, then the judgment-creditor gets nothing. The proper course of proceeding is, to call the debtor (or the garnishee) before a judge, to say whether he admits or disputes the debt; and it must be a debt due or accruing in respect of which the judgment-debtor has a beneficial interest. If the debtor has charged or parted with his interest in the debt, then, except as to any excess beyond the amount of the charge, no interest will go to the person obtaining the order. The result would be this,—The judgment-creditor would call the garnishee before a judge. If he admits the debt, and disputes his liability to pay, on the ground that his creditor has assigned his interest in the debt, and therefore he is liable to the assignee, the judgment-creditor must proceed by *scire facias* under s. 64, calling upon the garnishee to show cause why execution should not issue against him for the alleged debt, and for costs of suit: and, in my opinion, it would be a good plea to say,—“I decline to pay you, the judgment-creditor, because the judgment-debtor has assigned my debt to a third person, and I am liable to pay it to that third person.” For these reasons, I think, that, though the first order made by my Brother Crowder was right, the second was wrong; and that, upon the facts brought before us, there is nothing to entitle the judgment-creditors to call upon the garnishees to pay the debt to them. I think the rule should be made absolute without costs.

CRESSWELL, J.—I quite concur in the view of the statute taken by the Lord Chief Justice.

WILLIAMS, J.—I concur with my Lord and my Brother Cresswell, *764] but not without some little doubt. My Brother *Crowder proceeded upon this view of the statute:—When the parties were before him at Chambers under the 63d section, the garnishees did not dispute that the debt was due from them to the judgment-debtor: and, in that case, the statute says that the judge may order execution to issue. The learned judge thought that the statute was imperative. But I doubt whether the debt there spoken of does not mean a debt that is enforceable in the manner provided for by the act; or, in other words, whether an order can be made where the affidavits disclose the fact of a previous assignment of the debt to a third person. I think, however, enough will be done by setting aside the order of the 26th of May.

WILLES, J.—I think this statute must be construed like any other statute, giving its words their plain ordinary and proper sense. So construing it, I think it can only operate to give the judgment-creditor the same decree of charge upon the debts which are the subject of the order, as an assignment in bankruptcy would give,—such as the judgment-debtor was entitled to at law and in equity. Putting that construction upon the statute, no other course can be pursued than that which my Lord has pointed out. As to the first order, as at present advised, I think we ought not to interfere with it. It is merely an *ex parte* order,

which stands or falls with the subsequent order: and probably Mr. *Unthank's* purpose will be sufficiently answered by our setting aside the latter. It is not unlike the case of an order for charging stock under the 1 & 2 Vict. c. 110, s. 14,—as to which the observations of the Lord Chancellor upon the case of *Watts v. Porter*, in *Beavan v. Lord Oxford*, 25 Law Journ. Chan. 299, 806, are well worthy of attention. In the present case it appears, that, before the judgment was obtained against him, the debtor assigned *(amongst other things) all his debts to a third person. It follows, therefore, that no order can be made con- [*765 ferring on the judgment-creditor a right which the judgment-debtor had already divested himself of. Upon that ground, I think the order of the 26th of May should be set aside. With regard to that of the 14th of May, if it has any effect, independently of the statute, we ought not to interfere with it: if not, the garnishees will not be hurt by it.

Rule absolute to set aside the order of the 26th of May, without costs.

CLARKE v. WESTROPE. June 10.

The plaintiff entered upon the occupation of a farm under a written agreement, by which he agreed, amongst other things, "to pay 5*l.* sterling for every load of fodder, straw, haum, dung, or turnips, which should be sold or carried off the premises, and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises:" and also "to purchase all the hay, sanfoin, and tares now in the yard, also all the dung and manure now on the premises, also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides." And the landlord engaged, on the tenant's quitting the farm, to purchase all hay, sanfoin, and tares in the yard, the produce of the farm; also all straw from the crops of the previous harvest that might be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides:—

Held, that the plaintiff, not being by the terms of the agreement entitled to be paid for the manure at the expiration of his tenancy, was only entitled to be paid for the straw at a fodder price, viz. one-half the market price.

Held also, that, the incoming tenant having consumed the straw, and the valuers named by the parties not having agreed upon the valuation, or appointed an umpire, the plaintiff was entitled to maintain an action for it as upon a quantum meruit.

THE plaintiff declared, in his first count, for money payable by the defendant to the plaintiff for certain fixtures, chattels, and effects bargained and sold and relinquished and given up by the plaintiff to and in favour of the defendant at his request, and for and in respect of the plaintiff having relinquished and given up to and in favour of the plaintiff, at his request, and for and in respect of the defendant having received the benefit and advantage of certain work and labour done, and materials provided, and moneys expended by the *plaintiff in and about the ploughing, harrowing, rolling, scarify- [*766 ing, clod-crushing, drilling, folding, manuring, sowing, and other- wise cultivating and improving divers lands by the plaintiff ploughed, harrowed, rolled, scarified, drilled, crushed, folded, manured, sowed, and

otherwise cultivated and improved, as tenant thereof, and the benefit whereof the plaintiff had not received, nor any equivalent thereto, on entering the said lands.

The second count was for work done, and materials for the same provided, by the plaintiff for the defendant, at his request; the third, for hay, straw, chaff, colder, and goods sold and delivered by the plaintiff to the defendant; the fourth, for hay, straw, chaff, colder, and goods bargained and sold by the plaintiff to the defendant, at his request; the fifth, for money paid by the plaintiff for the defendant, at his request; and the sixth, for money found to be due from the defendant to the plaintiff on accounts stated between them: and the plaintiff claimed 336*l.* 14*s.* 9*d.*

The particulars of the plaintiff's claim, specially endorsed on the writ, were as follows:—

“The plaintiff claims the sum of 336*l.* 14*s.* 9*d.*, viz.

“For the price and value of work performed and seeds and materials supplied by the plaintiff for the defendant at and upon certain lands and premises called Morden Heath Farm, in the county of Cambridge, between the 1st of March and the 29th of September, 1853 . . .	£	s.	d.
	25	12	8

“And for the price and value of certain hay, straw, chaff, and colder, and fixtures belonging to the plaintiff, and for ploughing, harrowing, rolling, scarifying, clod-crushing, drilling, folding, carting, and other agricultural *767] work, matters, and *things done and performed by the plaintiff, and used and consumed by the defendant at and upon the said farm, lands, and premises between the 1st day of March, 1853, and the 1st day of June, 1854	611	2	1
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£636 14 9

“Less cash paid on account	300	0	0
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£336 14 9”

The defendant pleaded not guilty, and payment.

The cause was tried before Williams, J., at the first sitting in London in Easter Term last. The facts which appeared in evidence were as follows:—On the 20th of April, 1839, William Clarke (the plaintiff's father), and John Stock Clarke (his brother), entered into a written agreement with Lord Hardwicke for a lease of Morden Heath Farm (then consisting of 774 acres), for fourteen years from Michaelmas then next, at the yearly rent of 650*l.* The agreement was as follows:—

“Memorandum of an agreement made the 30th day of April, 1839, between Francis Hart, Wimpole, county of Cambridge, for the Right Hon. the Earl of Hardwicke, on the one part, and Messrs. William and John Stock Clarke, both of Steeple Morden in the said county:

"Whereas the said William and John Stock Clarke agree to hire of the Right Hon. the Earl of Hardwicke all that farm and lands known as Morden Heath Farm, situate in Steeple Morden, county of Cambridge, under the regulations hereafter specified, containing the admeasurement and at the annual rent of the same, 774 acres, at 650*l.* per annum. 1. We agree to hire the said farm for fourteen years from Michaelmas, 1889; the rent to commence on Michaelmas day, 29th of September, 1889, and to be paid quarterly, if called upon so to do, *viz. 1st April, 1st July, 1st October, and 31st December; [*768 and, if not so called upon, to pay at the usual half-yearly audit:

"2. We agree to pay all rates, taxes, and assessments on the said farm; the land-tax to be repaid on audit-day:

"3. We agree to farm the land upon the four-course system, never taking two white straw crops off the land in succession (cole-seed left to stand as a crop to be considered as a white straw crop), and to reside upon and cultivate the farm in a good husbandlike manner:

"4. We agree to pay 5*l.* sterling for every load of fodder, straw, haum, dung, or turnips which shall be sold or carried off the premises, and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there shall not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises; and 40*l.* for every acre, and in proportion for any smaller quantity than an acre, of pasture or meadow ground converted into tillage without permission in writing:

"5. We agree to clean and scour out all ditches, drains, and water-courses, to keep clean all young quick, to repair all fences for the protection of young hedges (Lord Hardwicke supplying the rough material), and also to repair or make new one-twelfth part of the fences every year, and to consume and spend all the hay, straw, haum, clover, sanfoin, and tares produced on the farm, or some part thereof, during the year:

"6. We agree to acquaint Lord Hardwicke's steward before a hedge is laid, and receive his permission previous to putting up or taking away gates, cutting spinneys, or with any desire to perform any act whereby the state of the property may be changed in any way or in any feature:

"7. We agree to protect all hedge-row and other *timber on the farm, and to pay 20*s.* for every tree, young or old, pruned, cut, or lopped, the loppings of pollards excepted: [*769

"8. We agree to Lord Hardwicke's right to plant trees, erect cottage buildings, and to allot gardens; a fair abatement of rent to be made in lieu, to be settled by arbitration, if necessary:

"9. We agree not to underlet, part with, or assign any portion of the farm, without the written permission of Lord Hardwicke or his steward:

"10. We agree to carry and draw all materials for the repairs of the farm, and to report when small repairs are required; and we agree to the article hereafter explained, intituled 'Tenants' Repairs:'

"11. We agree, twice in every year, at proper seasons, to mow the rushes, thistles, and weeds, to have whins and brambles stubbed up, which may be found growing upon the pasture fields, the sides of the arable land, and in the lanes and hedges adjoining the farm; and, in default of this, viz. hedges, fences, and ditches not properly cut and scoured, rushes, thistles, and weeds not twice mown, whins and brambles not stubbed up, after two months' notice by Lord Hardwicke or his steward,—we agree that they or either of them may employ proper persons to do the same, the expense of which we hereby make ourselves responsible for, and, for non-payment of the same, do agree to its being recovered in the same manner as arrears of rent:

"12. We agree to paint the inside and outside of doors, window-frames, door-sills, window-sills, gratings, and all manner of wood-work about and in the house, once every three years, with two coats of oil paint inside and three good coats of oil paint outside, and to tar with one good coat of Stockholm tar all the farm buildings and gates (except such as we choose to paint) once in three years; and, in default thereof, *770] after a fortnight's *notice, we agree to Lord Hardwicke or his steward sending proper persons to do the same,—the expense of which we hereby make ourselves responsible for, and for the non-payment of the same do agree to its being recovered in the same way as arrears of rent:

"13. We agree to Lord Hardwicke or incoming tenant sowing what quantity of seeds they please upon such part of the farm as may be sown with Lent grain in the last year of our occupying the same:

"14. We agree to prevent all persons from shooting, fishing, coursing, and hunting over the farm, except Lord Hardwicke and his friends, whose exclusive right to do so we hereby acknowledge; and we agree to prosecute all poachers and trespassers in pursuit of game on the farm,—the expenses incurred in such case to be paid by Lord Hardwicke:

"15. We agree to purchase all the hay, sanfoin, and tares now in the yard, *also all the dung and manure now on the premises*, also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides:

"16. We agree, on leaving the farm, to furnish an inventory of the fixtures, &c., belonging to the farm-house and buildings when the farm was entered upon; and do agree to give up all the fixtures in as good repair, fair allowance being made for wear during the term:

"17. We do also agree to draw, from any place within fifteen miles, ten tons of coals per annum, for the use of the mansion of Wimpole, at such times as Lord Hardwicke may desire.

"As witness our hands this 20th day of April, 1839.

"FRANCIS HART,

"WILLIAM CLARKE,

"J. S. CLARKE.

"I, Charles Philip, Earl of Hardwicke, do agree to *let the said farm for the yearly rent, mode of payment, and under the conditions as aforesaid : [*771

"2. I agree to supply rough timber for the repairs of fences, gates, and bridges, for making trunks or bunnies, as also for repairs in farm-yard if considered necessary :

"3. I agree to perform all substantial repairs, as enumerated in the article 'Landlord's Repairs;' to allow tiles, bricks, and lime for jobbing repairs; to make good the effects of time, fire, or tempest; but not to repair defects occasioned by the neglect of tenants, tenants' servants, or by stock :

"4. I agree to supply quickset for the repairing and planting afresh any fences required by the tenants for the improvement of the farm, and to furnish rough material for fencing the same,—the tenants keeping the quick clean and protected :

"5. I agree to purchase of Mr. Clarke, on his leaving the farm, all hay, sanfoin, and tares in the yard, the produce of the farm; (a) also all straw from the crops of the previous harvest, that may be on the premises, paying a fair price for the same, to be ascertained by valuers.

"As witness my hand this 20th day of April, 1839.

"HARDWICKE."

"Landlord's Repairs.

"Walls of the house, main beams, floors, rafters, window-frames, sills, and all substantial and important work on which the strength and durability of the buildings depend :

"In farm-yard,—material for walls and fences where new, and rough material generally, when considered necessary, and approved by Lord Hardwicke or his steward."

"Tenants' Repairs.

"Tiles and slates to roof, glass to windows, locks to doors, grates, boilers, oven, stack-saddles, gates, bridges, *and trunks, all daubing and claying and straw for thatching; and, if supplied with tar for the protection of the buildings, to apply it as directed by Lord Hardwicke or his steward." [*772

The plaintiff entered upon the occupation of the farm in 1848, upon which occasion he paid for the crops, manure, tillage, straw, &c., upon the farm. He quitted it at Michaelmas, 1853, when the defendant came in, having previously signed the following agreement:—

"I, the undersigned, do hereby undertake to pay Mr. Joseph Clarke for all the cultivation done upon the fallows of the Morden Heath Farm,

(a) "All dung and manure on the premises," struck out.

and also to pay for the carriage and labour of dung bought of Mr. Clarke, and folding of sheep upon the farm, at a valuation to be made in the usual way by two indifferent persons, or their umpire; the valuation to be made before the 29th of September, 1858. Witness my hand, this 30th day of May, 1858.

“THOMAS WESTROPE.”

Upon the defendant's coming in, a Mr. Mann was appointed valuer for the plaintiff, and a Mr. Nash for the defendant. The former valued the fixtures at 5*l.* 14*s.*, the tillages at 162*l.* 13*s.* 7*d.*, and the foldings at 48*l.* 4*s.* 6*d.*, which, added to 25*l.* 12*s.* 8*d.* for goods bought by the plaintiff at the request of the defendant, made a total of 237*l.* 4*s.* 9*d.* Thus far the two valuers agreed.

As to the straw, the market value at the time was admitted to be 25*s.* per ton, and the plaintiff's valuer, estimating it at a consuming price, or two-thirds the market value, allowed for it 373*l.* 17*s.* 4*d.*, which, added to the 237*l.* 4*s.* 9*d.*, made a total of 611*l.* 2*s.* 1*d.* The defendant's valuer did not concur in this valuation of the straw, conceiving that it ought to be estimated at a fodder or browsage price.

On the 17th of December, 1853, Mr. Mann, the *plaintiff's valuer, addressed a letter to Mr. Nash, the defendant's valuer, as follows:—

“If I may judge by your note, the only difference between us at Morden Heath, is, the principle upon which the valuation is to be made. If I construe the words of Lord Hardwicke's agreement rightly, you are to pay a consuming price for the straw. I have therefore a right to two-thirds the market value. The words ‘browsage’ or ‘feed’ are not made use of in any manner in the contract.”

Again, on the 1st of April, 1854, he wrote,—

“Mr. Clarke's bill of extras [meaning the 25*l.* 12*s.* 8*d.*] does not form any portion of the things enumerated in our valuation. You once gave me the names of several parties to choose a referee from, which I have mislaid; and I really do not recollect who they were. Have you any objection to one of the three following names to settle the questions in dispute,” &c.

Again, on the 6th of April, 1854, he wrote,—

“I think I am justified in saying Mr. Clarke has not been well used in this affair. Why did you not tell me, in the first instance, Mr. Westrope objected to pay for the straw in accordance with the agreement. The first word I ever heard about it was at Royston, the 20th of March: and then, unless Mr. Clarke chooses to take your terms, he is to be handed over to the tender mercies of my Lord Hardwicke. The only thing I had to guide me, was, the agreement, and to which I shall stick. I had the account of the cultivation, &c., from Mr. Clarke and Mr. Westrope, and at that time he gave me to understand the extra account formed no part of the one for our consideration. In accordance with your note, you consider the valuation between Clarke and West-

rope, as far as you are concerned, is ended, save that of summing up the amount."

*Again, on the 19th of May, 1854, he wrote,—

"I have enclosed you Mr. Clarke's private account against Mr. [*774 Westrope, and am most anxious to close that affair. Will you submit it to a third man, upon the basis of the agreement made by my client with Lord Hardwicke?"

It was proved, that, according to the custom of the country, the incoming tenant, in the absence of a special agreement, usually paid the outgoing tenant for the straw a consuming price, or two-thirds the market price; but that, if the outgoing tenant was bound to consume all the manure on the farm, the allowance in respect of straw, as between him and the incoming tenant, would be only one-half of the market price.

On the part of the defendant, it was insisted, that the plaintiff was not entitled to maintain the action, inasmuch as there had been no valuation pursuant to the agreement of the 30th of May, 1853; and that the terms of the contract under which the plaintiff entered upon the farm precluded any claim on his part to be paid more than a fodder price for the straw on quitting it.

In answer to questions put to them by the learned judge, the jury found that it was agreed between the parties that the valuation of the straw should be made on the same terms as that of the other matters mentioned in the agreement; that, on the supposition that the outgoing tenant was entitled to the manure, the straw was to be paid for at the rate of two-thirds the market price; that, assuming the tenant not entitled to the manure, the allowance for the straw should be at one-half the market price; and that, according to the custom of the country, where there was no special agreement to the contrary, the tenant was entitled to go out as he came in.

It was agreed, that the court should decide by whose fault the valuation went off.

*A verdict was accordingly entered for the plaintiff for 311*l.* [*775 2*s.* 1*d.*, leave being reserved to the defendant to move to enter a nonsuit on the first point, or to reduce the damages, on the second, to 215*l.*

Knowles, accordingly, in the course of the term, obtained a rule nisi to enter a nonsuit, "on the ground that the evidence showed that the plaintiff was not entitled to maintain the action until the amount had been ascertained by arbitrators or their umpire;" or to reduce the damages to 215*l.*, "on the ground, that, as the plaintiff was not entitled to be paid for the manure on leaving the farm, he was only entitled to be paid on the lower scale." The cases of *Thurnell v. Balbirnie*, 2 M. & W. 786,† *Scott v. Avery*, 8 Exch. 487,† and *Avery v. Scott*, 8 Exch. 497,† were referred to.

Byles, Serjt., and *Worlledge*, on a former day in this term, showed cause.—There are two questions for the consideration of the court in this case,—first, whether the plaintiff is entitled to maintain the action, —secondly, on what principle the damages are to be estimated.

1. It appears, that, in the year 1839, the plaintiff's father and uncle became tenants to Lord Hardwicke of the farm called the Morden Heath Farm, under an agreement, which contained (amongst others) the following stipulation on the part of the tenants,—“We agree to purchase all the hay, sanfoin, and tares now in the yard; *also all the dung and manure now on the premises*; also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides.” There was also this stipulation on the part of the landlord as to what he was to pay on the tenants' quitting the farm,—“I agree to purchase of Mr. Clarke, on his leaving *776] the farm, all hay, sanfoin, and tares in the yard, *the produce of the farm; also all straw from the crops of the previous harvest that may be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides.” The tenants also agreed to pay 5*l.* a load for every load of fodder, straw, haum, dung, or turnips which should be sold or carried off the premises, and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises,—which clearly confines the plaintiff to a consuming price. The plaintiff succeeded to the farm in 1848. The term expired at Michaelmas, 1853, before which day the defendant was let into possession, using the straw as he wanted it, and for which he verbally agreed to pay upon the same terms as he had agreed in writing to pay for tillage, &c. viz. “at a valuation, to be made in the usual way by two indifferent persons, or their umpire.” At the time the defendant entered, there was a large quantity of straw on the premises. Two persons were appointed to make the valuation; but they did not agree,—the plaintiff's valuer insisting that he was entitled to be paid for the straw at a “consuming price,” or two-thirds the market price,—the defendant's valuer contending that the plaintiff was only entitled to what he called a “browsage price,” or one-half the market price. The arbitration ultimately went off; and there was a controversy at the trial as to which party was in fault for the failure of the valuation. By the agreement of the 30th of May, 1853, the valuation was to be completed before the 29th of September: and the correspondence shows that it was proceeding long after that day. Whether the valuation failed through the default of the one party or of the other, is quite immaterial: the straw must still be paid for. It has repeatedly been held, that, where a matter is referred to two *777] arbitrators, they grossly mistake their duty if they consider themselves as advocates for the respective parties appointing

them.(a) If, therefore, the valuation went off here by reason of either of the valuers improperly refusing to name an umpire, the failure was occasioned by the default of a person who was the agent of neither party: and, if the plaintiff cannot get the valuation price, he may recover as upon a quantum meruit. In *Thurnell v. Balbirnie*, 2 M. & W. 786,† and *Scott v. Avery*, 8 Exch. 487,† which were cited on moving, the actions were founded upon executory agreements: whereas, here, the defendant has consumed the straw, and he has paid part of the price. [WILLIAMS, J.—You cannot apply any part of the 300*l.*, which was paid generally on account, to the straw, unless you establish that you were entitled to be paid for the straw.] *Cooper v. Shuttleworth*, 25 Law Journ. Exch. 114, is precisely in point: it was there held, that an agreement to settle disputes between two parties as to the amount to be paid by one of them in respect of the value of goods belonging to, or work done by, the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting: the party is only bound to appoint a valuer on his part; and, if the person appointed does not act, *the other party is remitted to his original cause of action*. [CRESSWELL, J.—In that case the party had had the goods before the agreement to refer the price was entered into.] The principle which will govern this case as to this point, is very elaborately discussed in the notes to *Cutter v. Powell* (6 T. R. 320), *Smith's Leading Cases*, 19, 20, *where [*778 it is said: “The general rule being established, that, while the special contract remains unperformed, no action of indebitatus assumpsit can be brought for anything done under it, we now come to the exceptions from that rule: and the first of them is that adverted to by Parke, J., in the passage just cited.(b) It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred upon him is reasonably worth, and, to recover that quantum of remuneration, an action of indebitatus assumpsit is maintainable. This is conceived to be a just expression of the rule of law, as it at present prevails.” The same rule is laid down in *Lucas v. Godwin*, 8 N. C. 737 (E. C. L. R. vol. 32), 4 Scott, 502, (E. C. L. R. vol.

(a) See the cases referred to in *Russell on Awards*, 2d edit. pp. 211, 212.

(b) “In some cases, a special contract not executed may give rise to a claim in the nature of a quantum meruit, ex. gr. where a special contract has been made for goods, and goods sent not according to the contract have been retained by the party, there a claim for the value on a quantum valebant may be supported. But then, from the circumstances, a new contract may be implied.” Per Parke, J., in *Read v. Rann*, 10 B. & C. 438, 441 (E. C. L. R. vol. 21).

86), where Tindal, C. J., says,—“It never could have been the understanding of the parties, that, if the house were not done by the precise day, the plaintiff would have no remuneration: at all events, if so unreasonable an engagement had been entered into, the parties should have expressed their meaning with a precision which could not be mistaken.”

*779] *2. If, then, the straw is to be paid for, upon what principle is the valuation to proceed? The result of the evidence seems to be this,—If the plaintiff was not entitled to be paid for manure on quitting the farm, the straw would be of less value, inasmuch as it would be converted into an article for which he was not to be paid. The question, then, is, upon what terms did the plaintiff hold? That depends upon the agreement of the 20th of April, 1839, and the custom of the country; for, where there is nothing in the lease or agreement to exclude it, the custom of the country is included in it. The evidence as to the custom was,—and the finding of the jury was in accordance with it,—that, in the absence of a stipulation to the contrary, the tenant is to go out on the same terms as he comes in. In *Hutton v. Warren*, 1 M. & W. 466,† it was held, that a custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it,—is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. [WILLIAMS, J. —All the cases are collected in the notes to *Wigglesworth v. Dallison* (Dougl. 201), 1 Smith's Leading Cases, 458.] There is nothing inconsistent in this agreement with the custom of the country, as proved. By the agreement, the tenant was to pay for all the dung and manure on the farm when he went in. The question did not arise upon his *780] going out; for, then there was none: but, as to dung, the *agreement is silent as to what shall happen on the tenant's quitting: consequently, if there had been any dung on the farm at the expiration of the term, the tenant would, according to the custom of the country, have been entitled to be paid for it. No reliance can be placed upon the circumstance of the words “also all dung and manure on the premises” being expunged from the latter part of the agreement: see *Cumberland v. Bowes*, 15 C. B. 348 (E. C. L. R. vol. 80). The plaintiff, it is submitted, is entitled to be paid for the straw upon the higher valuation, viz., two-thirds of the market price.

Knowles and *Lush*, in support of the rule.—2. It is material to see if the custom of the country can apply here. If the outgoing tenant is not entitled to the manure, the valuation here must be upon the lower

scale only, which would reduce the verdict to 215*l*. The parties whom the plaintiff succeeded in the occupation of the farm, entered under an agreement which clearly disentitled them to be paid for the manure on quitting. By the 4th regulation, they agree "to pay 5*l*. sterling for every load of fodder, straw, haum, dung, or turnips which should be sold or carried off the premises; and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises." This shows the intention of the parties to be, that the whole should be expended on the land. [CRESSWELL, J.—If the straw left at the end of the term is to be paid for, why not the dung?] The largeness of the penalty shows that the tenant was not to be paid for the dung. [JERVIS, C. J.—The tenant cannot remove it: but, according to the custom of the country, the landlord or the incoming tenant pays for it.] The custom of the country is excluded by the express terms of the agreement as to *what the landlord is to purchase on the tenant's going out, viz., [*781 "all hay, sanfoin, and tares in the yard, the produce of the farm; also all straw from the crops of the previous harvest, that might be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides,"—expressly excluding dung. 1. It is submitted, however, that this action will not lie at all, the parties having by their agreement made it a condition precedent that the price to be paid shall be ascertained by valuers, and that condition not having been performed. Upon this subject, the rule is the same in equity as at law. It is well expressed by Sir William Grant in *Milnes v. Gery*, 14 Ves. 400, 406. There, the parties entered into an agreement for the sale of property according to the valuation of two persons, one chosen by each, or of an umpire to be appointed by those two in case of disagreement. Upon a bill for specific performance, praying that the court would appoint a person to make the valuation, the Master of the Rolls said: "The more I have considered this case, the more I am satisfied, that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered, was, to purchase at a price to be ascertained in a specific mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of the essence of a contract of sale. In this instance, the parties have agreed upon a particular mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner, certainly, does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The court declaring that the one shall take and the other shall give a price fixed

*782] in any other manner, does not *execute any agreement of theirs, but makes an agreement for them, upon a notion that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence, which, upon a subject materially interesting to him, he has reposed in an individual of his own selection? No substantial difference arises from the circumstance, that, in this case, the decision may ultimately fall to an umpire not directly nominated by the parties; as, through the medium of the original nominees, they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided." So, here, the contract cannot be enforced or carried into effect until the price of the straw has been ascertained in the manner in which the parties have mutually agreed that it should be ascertained. [JERVIS, C. J.—When you have taken the straw, and actually consumed it, can you say that the valuation price only is the price to be paid? CRESSWELL, J.—The case of *Milnes v. Gery* only amounts to this,—The defendant agreed to buy the estate at a price to be fixed by two persons named, or an umpire. The price not having been so fixed, the defendant was held not to be bound by his agreement to buy at a price to be ascertained in some other way.] *Scott v. Avery*, 8 Exch. 487, 497,† is precisely in point to show that the ascertainment of the price is a condition precedent to the plaintiff's right to sue. [CRESSWELL, J.—Before you rely much upon that case, it might be as well to wait for the decision of the House of Lords. The opinions of the judges were delivered a few days since; and I believe they were equally divided.] The defendant is entitled to rely on the decision of the Exchequer Chamber, as it now stands.(a) With regard to the case *783] of *Cooper v. Shuttlesworth*, it may be observed, that it was not argued upon the ground now presented to the court: the agreement to refer there was no part of the agreement before the court; here, it is. Neither does the case of *Lucas v. Godwin* present any difficulty in the way of the defendant. The present case more nearly resembles

(a) The House of Lords pronounced judgment on the 11th of July, 1856, affirming the decision of the Exchequer Chamber. A member of a marine insurance association effected with it a policy in the ordinary form of club-policies, upon a ship in which he was interested; and it was agreed, that all the rules and regulations of the association should be as binding between the parties as if they were inserted in the policy, and formed part of it. One of these rules was to the effect that the sum to be paid by the association to any suffering member for any loss, should in the first instance be ascertained by a committee, after (but not before) which he was to be entitled to sue for the amount settled by the committee: but, if a difference should arise between him and the committee relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance, it was to be submitted to arbitrators, who were to decide upon the claims and matters in dispute according to the rules and customs of the association; and there was a proviso that no member refusing to accept the amount of any loss as settled by the committee, in full satisfaction of such loss, should be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute were so decided, and then only for such sum as the arbitrators should award; and the obtaining such decision was to be a condition precedent to the right of any member to maintain such action or suit. It was held, that this was a legal contract, binding in its terms, and that no action would lie for its breach, until the condition to refer to arbitration had been complied with.

those where by the terms of the contract a man is to be paid for work under the certificate of an architect or a surveyor: until the certificate is obtained, the party is entitled to nothing. (a) That was the view taken by the Lord Chief Baron in *Cumberland v. Bowes*. To entitle him to recover, the plaintiff was bound to show a new *contract, to pay [*784 for the straw at some other price than the uncertain price stipulated for by the agreement. This he did not do. Neither has he shown that a valuation has become impossible. The quantity of the straw having been ascertained, any other valuers might fix the price.

JERVIS, C. J.—We are all agreed that the plaintiff was entitled to be paid for the straw left on going out, but at the lower price only, viz., a fodder price, inasmuch as the agreement does not provide for his being paid for the manure on giving up the farm. Whether or not he is entitled to maintain the action at all, we have not quite made up our minds. We will therefore take a little time for deliberation.

CRESSWELL, J.—The ground of our decision on the first point, is, that there is an express stipulation that the tenant shall pay for the manure on going in, but no stipulation that he shall be paid for it on going out.

Cur. adv. vult. (b)

JERVIS, C. J., now delivered the judgment of the court.

At the close of the argument of this case on a former day, we intimated our opinion that the plaintiff was entitled, if at all, to recover the smaller amount only, on the ground that, as the terms upon which the valuation as between outgoing and incoming tenant was to be made, were contained in a written agreement, and that written agreement provided only that the outgoing tenant should be paid for the straw on the premises, and not for the *dung, according to the clear and [*785 established rule in these cases he was entitled to be paid for the straw only at a fodder price. It was thereupon agreed, that, if the straw was to be taken at a fair valuation where the dung was not to be paid for, the straw should be paid for at a fodder price, or one-half the market value, which would make the amount the plaintiff was entitled to recover 215*l*.

The only point which remained to be considered, was, whether, inasmuch as the valuation went off, and the straw had been consumed by the beasts of the defendant, so that a valuation had become impossible, an action would lie in order to have the value assessed by a jury. Upon consideration, we are of opinion that the action *will* lie for the smaller sum; and that, as the valuation contemplated by the parties had become impossible by reason of the straw having been consumed, it was competent to a jury to estimate it. The proper estimate being admitted to be such as to leave a balance of 215*l*. due to the plaintiff, the verdict will therefore stand for that sum.

Rule accordingly.

(a) See *Pashby v. The Mayor, &c., of Birmingham*, ante, p. 2.

(b) It was agreed, that the amount due upon the valuation at the lower price was 215*l*., for which sum the verdict was to be entered for the plaintiff, if at all.

***786] *RANDELL and Another v. TRIMEN. June 4.**

The declaration stated that the defendant, who was employed as architect by A. and others to superintend the building of a church, falsely and fraudulently represented and pretended that he was authorized by A. to order, and did order, stone of the plaintiffs for the building of the said church for and on account of, and to be charged to, A.; and that the plaintiffs, relying on that representation, and believing that the defendant had authority from A. to order the stone on his account, delivered the same, and the same was used in the building of the church; whereas in truth and in fact the defendant was not, as he well knew, authorized so to order the said stone. It then went on to aver, that, A. refusing to pay for the stone, the plaintiffs, trusting in the defendant's representation, sued A. for the price, and failed in their action, and had to pay A.'s costs, and also the costs incurred by their own attorneys:—

Held, that the declaration sufficiently disclosed a cause of action; and,—it appearing that the defendant had no such authority as he represented,—that the plaintiffs were entitled to recover, not only the value of the stone, but also the costs they had incurred and paid in the former action.

THIS was an action for a false and fraudulent representation.

The first count of the declaration stated, that, whereas, before and at the time of the committing of the grievances thereafter mentioned, a church was in course of being erected and built in the district of Werneth, in the parish of Oldham, to be called St. Thomas's church, of which district the Rev. Thomas Ireland was incumbent and minister, and was active in causing the said church to be built; and the defendant had been and was employed as architect to superintend the said works and buildings; the said defendant, so being such architect employed as aforesaid, did falsely and fraudulently represent and pretend that he was authorized by the said Rev. Thomas Ireland to order, and did order, certain stone of the plaintiffs for the building of the said church, for and on account of, and to be charged to, the Rev. Thomas Ireland and others, the committee for St. Thomas's church, Werneth, Oldham, and did then falsely and fraudulently write and send to the plaintiffs the following letter, viz., "9 Adam St., Adelphi, Nov. 8, 1853. Gentlemen,—To-morrow I should be glad for you to send 700 feet of stone, the remainder of the 1000, to Oldham; but this must be for the Rev. Thomas Ireland (meaning the said Rev. Thomas Ireland) and others, *787] the committee for St. Thomas's church, Werneth, Oldham. *At the same time, I hope it is on its way by water. Yours, &c., A. Trimen. To Messrs. Randell & Co." (meaning the plaintiffs): That the plaintiffs, relying on the said representation of the defendant, and believing that the defendant had authority from the said Rev. Thomas Ireland to order the said stone for the building the said church for and on account of and to be charged to the said Rev. Thomas Ireland and the said committee, forthwith upon the receipt of the said letter and order of the defendant did send and deliver the 700 feet of stone so ordered as aforesaid, to Oldham, for the said Rev. Thomas Ireland and others, the committee for St. Thomas's church, Werneth, Oldham aforesaid, and the same was there used and worked up in building the said church: whereas, in truth and in fact the defendant was not, as

he then very well knew, authorized by the said Rev. Thomas Ireland to order the said stone, or any stone, for or on account of, or to be charged to, the said Rev. Thomas Ireland and others, the committee of the said church, or any of them, or to write or send the said letter to the plaintiffs; but then very well knew that the said representation was false: That, the said Rev. Thomas Ireland having refused to pay for the said stone, and the same being wholly unpaid for, they, the plaintiffs, trusting in the said representation, sued the said Rev. Thomas Ireland in this court in an action for the price of the said stone, amounting to 78*l.* 18*s.*, which the said Rev. Thomas Ireland defended, and denied his liability thereon; which came on to be tried at the sittings in the Guildhall of the city of London, on the 12th of May, 1855, when a verdict passed thereon for the said Rev. Thomas Ireland, by reason of the (now) defendant not having been authorized by the said Rev. Thomas Ireland to order the said stone for or on account of, or to be charged to, the said Rev. Thomas Ireland and the said committee, or to write or send to the plaintiffs the said *letter; and judgment was afterwards signed against the plaintiffs; whereupon, and by reason of the [*788 premises, the plaintiffs had not only lost the said price of the said stone, which had not yet been paid, but also had expended and had become liable to pay divers large sums of money, amounting, to wit, to 200*l.*, in unsuccessfully suing the said Rev. Thomas Ireland, and also had become and were liable and bound to pay the further sum of 65*l.* 8*s.* to the said Rev. Thomas Ireland for his costs in defending the said action.

The declaration also contained counts for goods sold and delivered, money received by the defendant for the use of the plaintiff, and money found due upon an account stated.

To the first count the defendant pleaded not guilty, and, to the residue of the declaration, never indebted.

The cause was tried before Crowder, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—The plaintiffs were stone-merchants carrying on business at Corsham, in the county of Wilts, and having also a depot for stone at Manchester. The defendant was an architect residing in London. In the year 1853, the defendant was employed by a committee consisting of the Rev. Thomas Ireland and three other persons, as architect, to superintend the erection of a church at Werneth, near Oldham, in the county of Lancaster. When the work was commenced, the defendant disapproved of the stone which was intended to be used, and induced the committee to consent to substitute Bath stone for it, which the defendant agreed to procure at 1*s.* 6*d.* per foot. The lowest price, however, at which Bath stone could be had, turned out to be 1*s.* 10*d.* per foot; and a considerable quantity was supplied by the plaintiffs at that price. On the 24th of June, 1853, the defendant wrote to the plaintiffs as follows:—

*789] “I shall be glad if you can in the course of a few weeks deliver for me, or the committee for building the new church of St. Thomas at Oldham, 70 or 80 tons of best Bath stone, at the price named, in canal at Oldham, i. e., 1s. 9d.; and, as you have kindly offered to-day, forward at once a few blocks, say 300 or 500 feet, from Manchester.”

On the 25th, the plaintiffs replied as follows:—

“Your order for a cargo of 70 to 80 tons of stone to Oldham shall have our prompt attention. We will also forward some from Manchester at once. Please say to whom it should be consigned at Oldham. The price named was 1s. 10d. per foot, and not 1s. 9d., as quoted by you in error.”

In answer to this, the defendant wrote, desiring the plaintiffs to send the stone to “G. Roberts, the contractor:” and, on the 10th of September, he again wrote,—“I may name that I expect to deal largely with your stone in town and country, by the end of the present year, but shall not be likely again to become the purchaser, but, in the country, shall, in cases where you may require it, reserve the amount coming to the builder. In the Oldham case, for first part of the works I have guaranteed the stone at Oldham canal depot for 1s. 6d. the foot. I shall get no more.”

On the 8th of November, 1853, the defendant wrote and sent to the plaintiffs the following, which is the letter mentioned in the declaration:—

“9 Adam Street, Adelphi,

“Nov. 8, 1853.

“Gentlemen,—To-morrow I should be glad for you to send 700 feet of stone, the remainder of the 1000, to Oldham; but this must be for the Rev. Thomas Ireland and others, the committee for St. Thomas's church, Werneth, Oldham. At the same time, I hope it is on its way by water.

“Yours, &c.,

“A. TRIMEN.”

*790] “The stone thus ordered having been sent by the plaintiffs, they called upon the Rev. Mr. Ireland to pay for it, when he denied that he had given the defendant any authority to contract for it in his name. The plaintiffs thereupon, on the 8th of May, 1854, wrote to the defendant as follows:—

“You will see by the enclosed letter from the Rev. Thomas Ireland that he will not take on himself any liability in respect of the stone you ordered. We shall be obliged by your remittance for 100l. 19s. 2d. to cover the account.”

On the 8th of June, the defendant wrote to the plaintiffs as follows:—

“I beg to state that the last portion of Bath stone sent to Oldham, amounting in value to about 70l., was ordered by me as the architect

and agent of the committee for the church at Werneth, in accordance with the terms of the contract, and with the concurrence of the Rev. Thomas Ireland, to whom I have sent a copy of this letter."

On the 27th of December, the plaintiffs wrote to the defendant:—

"We have sued the Rev. Mr. Ireland for the amount of the stone ordered by you as his architect. It will be defended; and the case comes on for trial next term (in London). Your evidence will of course be necessary to enable us to prove our case; and we shall feel obliged by your giving us an appointment to see you with our solicitor, to take your evidence."

To this the defendant replied on the same day,—“There can in my opinion be no doubt about your claim; and you ought long since to have been paid, if the stone was good.”

The action brought by the plaintiffs against the Rev. Thomas Ireland came on for trial before Crowder, J., at the sittings in London after Hilary Term, 1854, when the present defendant was called as a witness to prove *that he was authorized by the Rev. Mr. Ireland to order [*791 the stone on his account. This he in terms swore to: but, in consequence of his hesitation and self-contradiction when cross-examined as to the time at which he had received a letter from that gentleman,—dated the 7th of November, 1853,—in which he stated expressly that he could not allow any stone to be ordered in his name, the jury returned a verdict for the defendant.

The plaintiffs then commenced the present action, in which they sought to recover the 78*l.* 18*s.* for which they had unsuccessfully sued the Rev. Mr. Ireland; 30*l.* 1*s.*, for stone which they had supplied to the order of the defendant in the name of Roberts, the builder; 65*l.* 8*s.*, the costs of the defendant in the former action; and 100*l.* 18*s.*, the plaintiffs' own attorneys' costs in that action. The 30*l.* 1*s.* was paid into court after action brought and after issue joined.

On the part of the defendant, it was submitted that the evidence did not sustain the declaration, and that, at all events, the plaintiffs could not be entitled to recover more than the price of the stone.

The learned judge told the jury, that, if they believed that the defendant represented that he had the authority of the Rev. Mr. Ireland to order the stone in his name, and that that representation was untrue, the plaintiffs were entitled to recover the price of the stone, and also the whole costs of the former action; directing them, however, to deduct 80*l.* from the plaintiffs' costs of that action, as the sum by which he estimated that they would be reduced on taxation.

The jury accordingly returned a verdict for the plaintiffs on the first count, damages 240*l.*

T. Chambers, in Easter Term last, obtained a rule calling upon the plaintiffs to show cause “why there should not be a new trial on the ground that the verdict was *against the evidence; or why the [*792 entry of final judgment on the first count of the declaration

should not be stayed, on the ground that the letter set out in the declaration did not support the allegations of that count, and did not purport to be an authority by the defendant to order the goods in the name of the Rev. Thomas Ireland and others, the committee of Werneth church, and that there was no evidence of fraud; or why the damages should not be reduced to the sum of 73*l.* 18*s.*, on the ground that the costs of the former action were not recoverable." He also moved on the ground of misdirection: but upon that the court declined to grant a rule.

Montagu Chambers and *Malcolm* now showed cause.—Assuming that the letter of the 8th of November, 1853, as set out in the declaration, does not in terms allege that the defendant had an authority derived from Ireland to pledge his credit for stone supplied for the building of the church, it does not follow that the declaration is therefore bad. Enough appears on the face of it, without that letter, to show that the defendant falsely and fraudulently represented that he had such authority, and that the plaintiffs have sustained damage from that falsehood and fraud. It is unnecessary to cite authorities to show that an action will lie for that. The defendant's own correspondence clearly showed that he must have been aware that he was acting without any authority; and that he was persisting in his misrepresentation that he *had* authority down to the last moment. There is, therefore, no ground either for arresting the judgment or for quarrelling with the conclusion the jury came to. The plaintiffs are also clearly entitled to recover the costs which the defendant's misrepresentations induced them fruitlessly to incur.

T. Chambers was called upon by the court to support *his rule.—
*793] The letter of the 8th of November, 1853, does not allege that the defendant had any authority to pledge the credit of the Rev. Mr. Ireland for the stone in question: it carefully avoids any such statement. [JERVIS, C. J.—Is not the declaration good without that letter?] Without it there is no allegation of fraud. [JERVIS, C. J.—Abundant.] Then, there is no pretence, upon the evidence, for saying that the defendant wilfully misrepresented his authority. [JERVIS, C. J.—The defendant is clearly liable for his misrepresentation as to his being authorized to order the stone in the name of the Rev. Mr. Ireland.] Even though he were honestly mistaken? [JERVIS, C. J.—Yes.] That, it is submitted, is contrary to the doctrine laid down by the Court of Exchequer in *Smout v. Ilbury*, 10 M. & W. 1.†(a) [JERVIS, C. J.—In

(a) There, a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad; and it was held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, and the determination of the life of the principal being equally without the knowledge of both parties.

that case, there was no representation at all by the defendant. The plaintiff was misled by a circumstance equally without the knowledge and beyond the control of both parties. WILLIAMS, J.—There was no assumption of authority by the defendant there. / JERVIS, C. J.—In the notes to *Thompson v. Davenport* (9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110), in 2 *Smith's Leading Cases*, 4th edit. p. 301, the learned editors state, that, "In the luminous judgment delivered in *Smout v. Ilbury*, the cases where agents have been held to be personally responsible, are divided into three classes,—1. Where the agent makes *a fraudulent representation of his authority, *with intent to deceive*,—2. Where he has no authority, and knows it, but nevertheless makes the contract as having such authority,—3. Where, not having in fact authority to make the contract as agent, he yet does so *under the bonâ fide belief that such authority is vested in him*, as, in the case of an agent acting under a forged power of attorney, which he believes to be genuine, and the like.] He is responsible for the price of the goods. [JERVIS, C. J.—No: for the misrepresentation. The note goes on to say,—“As to the form of action in which agents within these three classes can be made liable, it has been seen that (according to recent decisions not yet perhaps universally assented to) they cannot be sued upon the contracts which they have entered into without authority, on behalf of their assumed principals, unless they can be shown to be themselves principals. It seems clear, however, that agents within the first and second classes would be liable in an action of deceit for false representation, although it is conceived that that form of action would not be applicable to the case of agents within the third class, the representation of authority being *bonâ fide*: see the notes to *Pasley v. Freeman* (3 T. R. 51), ante, 81 et seq.: but see per Erle, J., in *Jenkins v. Hutchinson*, 13 Q. B. 748 (E. C. L. R. vol. 66). An action, however, on an implied contract for the existence of the authority each professed to have, would appear to include all three classes.” *Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 83), is also a very strong case.] / Then, as to the damages,—no case is to be found where costs have been held recoverable by a *plaintiff* who has brought an action in which he has failed. Where an action is improvidently defended, the defendant is not allowed to recover the costs of his defence. It is only where the party who is sought to be charged has been actively concerned in the defence, that the costs are recoverable.

*JERVIS, C. J.—This rule must be discharged. The grounds of the opinion I have formed have been sufficiently stated in the course of the argument. [*795]

The rest of the court concurring,

Rule discharged.

An agent who makes a contract in is personally liable: *Much v. Smith*, 7 the name of another without authority *Wendell*, 315; *Clark v. Foster*, 8 Ver-

mont, 98; *Sinclair v. Jackson*, 8 Cowen, *Bank of Hamburg v. Wray*, 4 Strob-
543; *Ballou v. Talbot*, 16 Mass. 461; *hart*, 87; *Tefts v. York*, 4 Cushing, 871;
Laing v. Stewart, 1 Watts & Serg. 222; *Johnson v. Smith*, 21 Conn. 627;
Edings v. Brown, 1 Richardson, 255; *Keenor v. Harrod*, 2 Maryland, 63.

END OF TRINITY TERM.

MEMORANDA.

On the 5th of January, 1856, the Right Hon. Sir James Parke resigned the office of Baron of the Court of Exchequer. He was created a Peer of the Realm for the term of his natural life, by the title of Baron Wensleydale, of Wensleydale, in the North Riding of the county of York.

The dignity of a Baron of the United Kingdom was afterwards granted to him and the heirs male of his body, by the title of Baron Wensleydale, of Walton, in the County Palatine of Lancaster.

He was succeeded by George Williams Wilshere Bramwell, of the Inner Temple, Esq., who had previously been called to the degree of the coif, when he gave rings with the motto "Diligenter."

Mr. Baron Bramwell shortly afterwards received the honour of knighthood.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Trinity Vacation,

IN THE
NINETEENTH AND TWENTIETH YEARS OF THE REIGN OF VICTORIA. 1856.

THE Judges in attendance were:—

JERVIS, C. J.
CRESSWELL, J.

WILLIAMS, J.

TARRANT v. WEBB. *June 18.*

A master is not generally responsible for an injury to a servant from the negligence of a fellow servant: but that rule is subject to this qualification, that the master uses reasonable care in the selection of the servant.

The plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defendant. In leaving the case to the jury, the judge told them, that, if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover:—Held, a misdirection.

THIS was an action brought by the plaintiff, a workman, to recover damages for an injury sustained by him from the falling of a scaffolding on which he was working in the employ of the defendant, a house decorator.

129 Munn 274: 23 C. 2. 321.

*798] The declaration stated that the plaintiff was employed *by the defendant to do certain work for the defendant on a scaffolding erected by the defendant for that purpose; yet that the defendant so carelessly, negligently, and improperly erected the said scaffolding, and employed the plaintiff to work thereon, that, by reason of the negligence, carelessness, and improper conduct of the defendant, the plaintiff was exposed to unreasonable risk in his said work, and the said scaffolding gave way, and the said plaintiff was thrown therefrom and seriously injured, and became and was, and still continued, unable to follow his trade as a painter, and had been and was otherwise damnified. And the plaintiff claimed 200*l*.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Crowder, J., at the second sitting at Westminster in Trinity Term last. The facts were as follows:—The defendant was employed to decorate the Carlton Club-house. In order to paint the entrance hall, a scaffolding was erected about thirty feet high, upon which the plaintiff and four other journeymen were at work. This scaffolding having been insecurely built, one of the upper poles broke, and the plaintiff was precipitated to the pavement below, and severely injured.

The scaffolding was erected by one Martin, who was employed for that purpose by the defendant,—the defendant himself not interfering with it, except, that, when Martin told him that the painters said it wanted an additional upright in the centre to make it secure, the defendant observed, that, if he (Martin) hearkened to the painters, he would have nothing else to do.

It appeared that the accident was mainly attributable to the want of that additional upright; but one of the witnesses ascribed it partly to an undue accumulation of boards which had been placed on the scaffolding by the workmen themselves.

*799] *On the part of the defendant it was submitted, on the authority of *Wigmore v. Jay*, 5 Exch. 355,† that the defendant was not responsible for the failure of the scaffolding, if he neither personally interfered with its erection, nor knowingly employed an unskilful and incompetent person to erect it.

The learned judge, in leaving the case to the jury, told them, that, if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff, damages 25*l*., observing that they thought Martin was not a proper person to erect the scaffolding.

M. Smith, in the course of the term, moved for a new trial, on the grounds,—first, of misdirection on the part of the learned judge, in

telling the jury that the defendant would be liable if he employed incompetent persons to erect the scaffolding; for that the employment of incompetent persons simply would not render the defendant liable, and at all events would not do so unless the defendant knew of their incompetency, of which there was no evidence,—secondly, that the verdict was against evidence. He also moved in arrest of judgment, on the ground that the declaration did not show the breach of any duty for which the defendant was liable to the plaintiff; that no scienter of the defendant was alleged; and that it was consistent with the declaration that the plaintiff knew that the scaffolding was unsound, and voluntarily undertook the risk. Whether Martin was a competent person or not, the defendant is not responsible, provided he used ordinary care and caution to procure an efficient person to do the work. [*800

*A master does not warrant the competency of every workman [800] he employs. In *Priestley v. Fowler*, 3 M. & W. 1,† which was an action by a servant against his master, to recover damages for an injury sustained by him through the breaking down of a van in which he was travelling with goods for his master, Lord Abinger says: “The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve with him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.” So, in *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343,† and *Wigmore v. Jay*, 5 Exch. 354,† it was distinctly laid down, in *affirmance of the doctrine in *Priestley v. Fowler*, that [*801] a master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, provided the latter be a person of competent care and skill.

[JERVIS, C. J.—Here, the jury found that the person employed to erect the scaffolding was an improper person for that purpose.] The verdict is general: and, if either of the views presented to the jury by the learned judge was incorrect, there must be a new trial. [CRESSWELL, J.—Did the learned judge tell the jury, that, if they found either interference on the part of the defendant in the erection of the scaffolding, or incompetency of Martin, the person employed to erect it, whether such incompetency was known to the defendant or not, they must find for the plaintiff?] Distinctly. In *Couch v. Steel*, 8 Ellis & B. 402 (E. C. L. R. vol. 77), the declaration alleged, that the plaintiff engaged with the defendant to serve on board the defendant's (a British) vessel, as a common seaman, on a specified voyage from and to a British port; and assigned for breach that the vessel was leaky and unseaworthy, by which the plaintiff became unwell and sustained damage: and it was held, on demurrer, that the count was bad, there being no allegation of knowledge or deceit, nor of any express warranty that the vessel was seaworthy; and the law not implying any such warranty from the relation of shipowner and seaman. So, here, the declaration merely avers negligence, and no scienter: and that clearly is ground for arresting the judgment.

Udall now showed cause.—There was no misdirection on the part of the learned judge; the direction he gave to the jury being precisely in accordance with the decision of the Court of Exchequer in *Wigmore v. Jay*. If a master uses ordinary care in procuring competently skilled *802] workmen, he is not responsible for injury *resulting to a fellow workman through their negligence or unskilfulness. The court will not be inclined to carry the doctrine further than that. It is contended on the other side, that, not only must it appear that the person employed to put up the scaffolding was an incompetent person, but that it must be shown affirmatively that the defendant knew that he was incompetent. In *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343,† there was a plea, that the engines, &c., were under the guidance of the servants of the company, who were fit and competent persons to have the guidance of the same: and, in delivering judgment, Alderson, B., said: "The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care; and the object of the plea in this case, is, to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased." [JERVIS, C. J.—The defendant need not establish, that, in order to render him liable, the employer must know of the incapacity of the workman. It is enough if the master uses ordinary care and caution in the selection. The way in which my Brother Crowder left

the question, was, whether Martin was a competent person. He should have left it to the jury to say whether or not the defendant used ordinary care in endeavouring to procure a competent person. That was not put: the defendant's liability was made to hinge upon the competency of Martin.] It is submitted, that the proper question was put. If Martin was an incompetent person, the defendant would clearly be liable. [JERVIS, C. J.—Clearly not. The jury are told, that, if the defendant interfered in the erection of the scaffolding, or if Martin was *incompetent, they must find for the plaintiff. That alternative [*803 direction cannot be correct: mere interference, without negligence, could not make the master liable.] A master is liable for an injury resulting from the unskilfulness of an incompetent driver. The master is bound to see that those whom he employs are persons of reasonable care and skill: per Parke, B., in *Skip v. The Eastern Counties Railway Company*, 9 Exch. 223.† [JERVIS, C. J.—The master does not warrant the competency of those whom he employs.] In *Paterson v. Wallace*, 1 Macq. 748, 751, Lord Cranworth says: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or *ought to know*, that it is not so. And if, from any negligence in this respect, damage arise, the master is responsible." [CRESSWELL, J.—Is not the distinction this,—that, where injury arises to one servant from the mere negligence of another servant, the rule 'respondeat superior' does not apply. The general rule does not prevail, unless you fix the master with negligence. The question is, whether it is negligence on the part of a master to employ an incompetent servant or workman, if he uses reasonable diligence in endeavouring to procure a competent one.] The master, it is submitted, is bound to take care that the lives of his workmen are not placed in jeopardy through the unskilfulness of a person employed by him to do a work of this description. [WILLIAMS, J.—My Brother Cresswell puts it precisely as it is put in the judgment of the court in *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 353,†—"Though we have said that a master is not in general responsible to one servant *for an injury occasioned [*804 to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks."'] The rule is laid down in somewhat broader terms in other parts of the judgment. Does the master take upon himself no duty? [CRESSWELL, J.—No higher duty than that of using reasonable care in the selection of workmen.] Then, the declaration is in the common form. [JERVIS, C. J.—The direction of my Brother Crowder

makes the defendant's liability depend upon an alternative proposition, and one alternative was improperly put, and the verdict is general.]

JERVIS, C. J.—I am of opinion that the rule must be made absolute for a new trial, the case having miscarried in the way pointed out by Mr. Smith on moving. It is unnecessary to consider the question as to the liability of a master for an injury done to a workman through the negligence of a fellow-workman. The rule is now well established, that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. That, however, does not negative liability in every case. The master *may* be responsible where he is personally guilty of negligence; but certainly not where he does his best to get competent persons. He is not bound to warrant their competency. The summing up, I apprehend, fails in this, that the jury might have been of opinion that the defendant used every possible care to employ a competent person to erect the scaffolding, and yet that he was liable because it turned out that Martin was incompetent.

CRESSWELL, J.—I am of the same opinion. The question was discussed the other day in the Court of *Exchequer in a case of *805] Degg v. The Midland Railway Company.

WILLIAMS, J.—The cases expressly lay it down that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant. But that rule is subject to this qualification, that the master is guilty of no want of care in the selection of proper servants. Unless the master is guilty of negligence in that respect, the case is not taken out of the general rule. Rule absolute accordingly.(a)

(a) See Wiggett v. Fox & Henderson, 11 Exch. 832.†

See Brown v. Maxwell, 6 Hill, 592; ing, 270; Sherman v. Railroad Co., 15 Farwell v. Boston and Worcester Rail- Barbour, 574; Walker v. Bolling, 22 road, 4 Metcalf, 49; Hayes v. The Alab. 294; Coon v. Railroad Co., 1 Western Railroad Corporation, 3 Cush- Selden, 492.

SIMONS v. THE GREAT WESTERN RAILWAY COMPANY.

June 18.

The 7th section of the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. c. 31), does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods.

And it is for the court to say, upon the whole matters brought before them, whether or not the "condition" or "special contract" is just and reasonable.

A condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed,—Held, unjust and unreasonable.

Semble, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered,"—is just and reasonable.

A condition, that, in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, *however caused*,—is just and reasonable.

THIS was an action against the Great Western Railway Company for the loss of goods.

The declaration stated, that the plaintiff, to wit, on the 8th of November, 1854, delivered to the defendants, as common carriers, and the defendants, as such carriers, received, divers, to wit, 150 packages of furniture, goods, chattels, and effects of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendants, to wit, from Paddington, in the county *of Middlesex, to Taunton, in the county of Somerset, there to be safely delivered to the plaintiff for certain reward therefor then paid by the plaintiff to the defendants: yet the defendants so carelessly and negligently conducted themselves in and about the carrying and conveying of the said goods, that, by and through the carelessness, neglect, and default of the defendants, divers, to wit, 10 of the said packages, and the contents thereof, were wholly lost to the plaintiff, and the residue of the said packages, and the furniture, goods, chattels, and effects therein contained, were by the like carelessness, neglect, and default of the defendants in the carriage and conveyance thereof, greatly broken, damaged, and destroyed. And the plaintiff claimed 500*l*.

The defendants pleaded,—first, not guilty.

Secondly, that the plaintiff did not deliver to the defendants, nor did the defendants receive from the plaintiff, the said packages of furniture, goods, chattels, and effects in the declaration mentioned, or any part thereof, to be safely and securely carried and conveyed for the plaintiff by the defendants, and by the defendants to be safely delivered to the plaintiff, in manner and form as in the declaration alleged.

Thirdly, that they, the defendants, received from the plaintiff the said packages of furniture, goods, chattels, and effects in the declaration mentioned, to be carried by the defendants for the plaintiff from Paddington to Taunton as aforesaid, subject to a certain special contract made between the plaintiff and the defendants, and signed by the plaintiff, whereby it was agreed between the plaintiff and the defendants, that the defendants should not be answerable for the loss of, or for damage to, the said packages of furniture, goods, chattels, and effects, *if the same were insufficiently or improperly packed*; and that the said packages of furniture, *goods, chattels, and effects were insufficiently and improperly packed. [**807*]

Fourthly, that the said furniture, goods, chattels, and effects in the declaration mentioned were received by the defendants from the plaintiff to be carried and conveyed by the defendants for the plaintiff from Paddington to Taunton as aforesaid, at a certain special mileage rate, and under and subject to a certain contract made between the plaintiff and the defendants, and *signed by the plaintiff*, whereby it was agreed that the said furniture, goods, chattels, and effects, being so received as in this plea mentioned, the defendants should not be answerable for any

loss or damage, however caused, of or to the said furniture, goods, chattels, and effects, while the same were being carried and conveyed by the defendants for the plaintiff; and that the said loss and damage in the declaration mentioned occurred and was caused while the said furniture, goods, chattels, and effects were being carried and conveyed by the defendants for the plaintiff.

The plaintiff took issue on all the defendants' pleas: and, for a second replication to the third and fourth pleas respectively, said, that the said contracts in those pleas mentioned, were respectively contained in a certain paper or document, partly printed and partly in writing, purporting on the face thereof to specify the packages of the said furniture and goods received by the defendants as in the declaration mentioned, and the charges to be paid on the delivery thereof; on the back of which said document was printed a certain notice, conditions, or declaration, limiting the liability of the defendants for loss or injury to the said goods in the receiving, forwarding, or delivery thereof occasioned by the neglect or default of the defendants, and which said paper or document was in the words and figures following, and not further or otherwise,—

*808] “Special agreement for conveyance as follows:—

“To the Great Western Railway Company,
Paddington Station.

“8, 11, 1854. Receive from John Simons of ———, the under-mentioned, on the conditions stated on the other side:—

“To be sent to Taunton Station at the rate or charges below mentioned, which I agree to pay or cause to be paid on delivery of such goods to the consignee, or his order, in consideration of the nature and description of the same.

[Here followed a description of the packages, the price of carriage, and the signature of the consignor.]

“The Great Western Railway Company
give public notice,—1. That they will not be accountable for any article conveyed upon their railway, unless it be entered and signed for and received by them; nor will they be responsible for the loss of or injury to any article or articles of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Bank of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland, or of any foreign country, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in any parcel or

packages which shall have been delivered, either to be carried for hire or to accompany the person of any passenger, on their railway, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l*.

"2. That they will not carry, nor allow to be carried, *on [*809 their railway, for any persons, unless by special agreement, any aqua fortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which in their judgment may be of a dangerous nature; and, if any person send by the railway any such goods without distinctly marking their nature on the outside of the packages containing the same, or otherwise giving notice in writing to the book-keeper or other servant of the company with whom the same are so left, at the time of so sending, he will be liable by act of parliament to a penalty of 10*l*., which will be strictly enforced, as will also the amount of damage sustained on any other goods by means of the aforesaid dangerous articles.

"3. That they will not, until further notice, undertake to carry upon their railway for any person, unless by special agreement, any boiler, cylinder, bob, or single piece of machinery, or single piece of timber or stone, or any other single article, the weight of which shall exceed four tons.

"4. That they will not be accountable for the loss of or for damage to any goods arising from fire, civil commotion, tempest, or act of God; nor for loss, detention, or damage of wrappers, boxes, or returned empties of any description; nor for any goods put into returned wrappers, boxes, or empties; nor for any goods left until called for, or to order, or left or warehoused for the convenience of the parties to whom they are consigned; *nor for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described, or containing a variety of articles liable by breaking to damage each other*, nor for leakage arising from bad casks or cooperage, nor for damage to cast iron, furniture, or other goods of a slight construction: and they give notice, that *no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered.*

*"5. That no credit can be allowed, excepting by special arrangement; but all goods must be paid for either previously to or [*810 at the time of delivery; and, if payment be refused, any charge for delivery must be also defrayed in addition thereto. If goods are refused to be received by the consignee, for any cause whatever, they will be carried back, and redelivered to the consignor thereof, who will be required to pay the charge for such back-carriage and redelivery. In all cases, the company will hold goods in their possession in lien for their charges for carriage, back-carriage, and redelivery.

"6. That all goods, from whomsoever received, or to whomsoever belonging, shall be subject to a general lien, not only for the carriage

of those particular goods, but also for any general balance that may be due by the owner or by the public carriers of such goods to the said company; and that, if in fourteen days after notice shall have been given that such goods are detained for any claim of the company, and the money due be not paid, the goods will, at the discretion of the company, be sold by auction to defray the company's claims, and all expenses incurred thereon: but fish, fruit, and all other perishable articles will be disposed of, at the discretion of the company, immediately after giving the above notice, and without awaiting the above period of fourteen days.

"7. That all goods addressed to places within the limits of the company's local regulations for delivery of goods from the different stations on the railway, respecting which no directions to the contrary shall have been received, will be delivered by the company at those places.

"8. That the delivery of goods will be considered to be complete, and the responsibilities of the company will be considered to terminate, when the goods shall be unloaded out of the wagon, van, cart, or truck, *811] and placed *at the door of the consignee; and that the cellaring or warehousing of them will be at the owner's risk and expense, as also the removal of goods from the sender's premises into the agent's cart or wagon.

"9. That they will not, under any circumstances, be liable for loss of market or other claim arising from delay or detention of any train, whether in starting or at any of the stations, or in the course of the journey. The company do not undertake to send goods by any particular train, if there be an insufficient number of trucks at the station, or the trucks cannot be conveniently used for the purpose, notwithstanding the goods may have been taken to the station before the time appointed by the company.

"10. That all goods addressed to consignees resident beyond the limits of the company's local regulations for delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station, will be forwarded to their destination by public carrier, or otherwise, as opportunity may offer, or they will, at the discretion of the company by whom they may have been received, be suffered to remain on the company's premises, to be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners, as referred to in clause No. 4; but that the charges of such carrier will be added to those of the company, and the delivery of the goods by the company will be considered as complete, and the responsibility of the company will be considered to have ceased, when such carriers shall have received the goods for further conveyance. And the company hereby give notice, that any money which may be received by them as payments for the conveyance of goods by

carriers beyond their said limits, will be so received only for the convenience of the consignors, for the purpose of being paid to such other *carriers, and will not be received as a charge made by the com- [*812 pany upon the goods in the capacity of carriers, beyond the extent of their own railway. And the company hereby give further notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond their said limits.

"11. And in respect of all goods suffered to remain on the company's premises, or placed in shed or warehouse, or not removed from the company's wagons, whether so remaining by direction of the consignor or consignee, or while awaiting the opportunity of further transmission, or until the consignee can receive the same, the company hereby give notice, that such goods will, after forty-eight hours from their arrival (except bricks, ashes, coal, or coke, and such like mileage goods, which are to be chargeable from twenty-four hours after their arrival), be subject to the following charges for demurrage:—one day, 3s. 6d. ; two days, 8s. ; three days, 13s. ; four days, 18s. ; five days, 24s. ; six days, 30s. ; Sundays not included in charge; and 7s. per diem addition, when exceeding six days. Goods will be warehoused at a reasonable rate at owner's risk; the goods, nevertheless, being so held by the company at the risk of the consignors, consignees, or owners thereof.

"12. The company will not carry

Acids in carboys,	Iron (wrought and castings),	Picture frames,
Baskets (light),	Jewellery,	Prints or engravings,
Boilers (iron),	Joiners' work,	Statuary,
Castings (light),	Lace,	Straw (manufactured),
Chains,	Lucifer matches,	Sulphuric acid,
Furniture,	Machinery,	Teazels,
Glass (plate),	Money,	Toys,
" (stained),	Musical instruments,	Turpentine in carboys,
Goods (light),	Naptha in carboys,	Upholstery,
Gunpowder,	Organs,	Vitriol in carboys,
Hats,	Pictures,	

except upon a special agreement, and at the risk of the owners.

*"13. That the above conditions apply to all goods received [*813 by the above-named company at all or any of their offices and warehouses, wherever situated; and, as to all goods intrusted to them, they will only agree to carry them subject to the above conditions, and to all other the rules and regulations of the said company.

"14. That the company will not undertake, except by special agreement, to convey any less number at one time than two beasts, or three calves, or six pigs, or ten sheep; nor will they convey cattle, pigs, or sheep in any number for a less distance than seventeen miles on their railway, except by special agreement. And they hereby give public notice, that they will not be responsible for any loss, accident, or injury in respect of any animal conveyed upon their railway.

"15. *Goods conveyed at special or mileage-rate must be loaded and unloaded by the owners or their agents; and the company will not be responsible for any risk of stowage, loss, or damage, HOWEVER CAUSED, nor for discrepancy in the delivery, as to either quantity, number, or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, HOWEVER CAUSED.*

"16. That the company will not consent to carry any goods, unless, at the time of their being delivered at either of their stations for conveyance, a declaration or receiving-note be presented to the company's clerk or officer of the station, setting forth the goods according to their correct denomination, their weights and number, and the address of the parties to whom the same are to be delivered; and, if any goods shall be untruly or incorrectly declared or described in any such declaration *814] or receiving-note, so as to affect the rate to be charged *for the carriage thereof, the company will not be responsible for any loss or damage to such goods."

Averment, that the said packages in the declaration mentioned were delivered to the defendants as in the declaration mentioned, and that the said packages in the declaration alleged to have been respectively lost and damaged, were respectively lost and damaged by and through the default or neglect of the defendants or their servants in the receiving, forwarding, or delivery thereof; and that the said paper or document was signed by the plaintiff, and the said contracts in the third and fourth pleas respectively mentioned were respectively made and entered into after the making and passing of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); and that, by virtue of the said act, the defendants were and are liable for the loss and injury therein mentioned, notwithstanding the said notice, conditions, and declarations; and that the said contracts in the first, third, and fourth pleas respectively mentioned were and are, and each of them was and is, void.

Rejoinder to the second replication to the third and fourth pleas,—as to the plaintiff's second replication to the third and fourth pleas, that the conditions in that replication and in those pleas mentioned, with respect to the receiving, forwarding, and delivering by the defendants for the plaintiff, of the goods, articles, and things in the declaration mentioned, were and are just and reasonable.

Demurrer to the second replication to the third and fourth pleas,—assigning for causes, "that the Railway and Canal Traffic Act, 1854, does not make void a special contract between a railway company and any other party, respecting the receiving, forwarding, or delivering goods, *if the contract be signed* by the other party, or by the person delivering the goods to the company; that notices, conditions, and de-
*815] clarations, given *and made by railway companies, in order to limit their liability relative to the receiving, forwarding, and delivering goods, are not affected by the said act, unless they are unjust

or unreasonable; and that the plaintiff ought to have shown that, and how, the terms of the contract and notice in that replication mentioned applicable to the third and fourth pleas, are unjust and unreasonable." Joinder.

The plaintiff joined issue on the rejoinder to the second replication to the third and fourth pleas; and also demurred to the rejoinder to the second replication to the third and fourth pleas, on the grounds, that "it referred matter of law to the jury; and that the reasonableness of the conditions was matter to be determined by the court, and not by the jury." Joinder.

Honyman, in support of the demurrer.(a)—Two *questions [*816 are presented by this demurrer,—first, whether the replication is an answer to the plea,—secondly, whether the rejoinder is an answer to the replication. If the replication be held bad, there is an end of the case. The first question turns upon the proper construction and effect of the 7th section of the 17 & 18 Vict. c. 31. Formerly, carriers were usually protected by notices, provided they were brought to the attention of the parties sending goods by them. Then came the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, the 1st and 2d sections of which enabled carriers to limit their responsibility in certain cases by affixing a notice on their premises, and afforded protection to the carrier whether the customer saw the notice or not. The 4th section provided that the publication of notices should not limit the liability of the carrier in respect of any other goods conveyed. The 6th section provided that nothing in the act contained should extend to annul or affect any special contract for the conveyance of goods. If the notice was brought home to the customer, it might constitute a special contract under that section. The state of the law with reference to common carriers is reviewed with great astuteness by Parke, B., in *Wyld v. Pickford*, 8 M. & W. 443, 457,† showing, that, since the statute of 11 G. 4 & 1 W. 4, c. 68, carriers could only limit their liability by something which amounted to a special contract under s. 6. And the law is so stated in the notes to *Coggs v. Bernard* (2 Lord Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt, 18), in 2 Smith's Leading Cases, 177. To the same effect are

(a) The points marked for argument on the part of the plaintiff, were,—“That the Railway and Canal Traffic Act, 1854, renders companies liable for every injury occasioned to articles through the default or neglect of such companies or their servants, notwithstanding any notice, condition, or declaration to the contrary, unless the same be reasonable:

“That it is wholly immaterial whether the paper containing such notice, condition, or declaration, be or be not signed by the party sending the goods:

“That it was not necessary for the replication (to a plea setting up such a notice) to negative the justness and reasonableness of the notice, condition, and declaration, for two reasons,—first, because it sufficiently appeared from the notice, condition, and declaration themselves that the same were unjust and unreasonable,—secondly, because the stipulation coming by way of proviso to the preceding enactment, it lay on the defendants to aver that they were just and reasonable:

“That the reasonableness of the notice, condition, and declaration were matters to be decided by the court and not by the jury:

“And that the rejoinder was bad for referring to the jury mere matters of law.”

the cases of *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454 (E. C. L. R. vol. 70), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 16 Q. B. 600 (E. C. L. R. vol. 71), *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707,† *Walker v. The York and North Midland Railway Company, 2 E. & B. 750 (E. C. L. R. vol. 77), and *The York, Newcastle, and Berwick Railway Company, App., Crisp, Resp.*, 14 C. B. 527 (E. C. L. R. vol. 78). Walker v. The York and North Midland Railway Company was an action against a railway company for not duly carrying fish from Scarborough to Manchester, averred to be received by the defendants at Scarborough to be carried as common carriers to Manchester. The defendants pleaded,—that they did not receive the fish as common carriers,—and that they received it on certain terms set out in the plea. At the trial, there was evidence that the defendants printed many notices declaring that they would not carry fish except on terms relieving them from all liability, and declaring also that none of their servants had power to vary those terms; that a number of these notices were sent to Scarborough, and served on the fish merchants there, including the plaintiff; that they generally threw down the notices; and that the plaintiff told the defendants' station-master at Scarborough that they were not of any use; after which the fish were sent by the plaintiff by the defendants' railway, and were not duly carried. The judge advised the jury, if they were satisfied that the plaintiff was served with the notice, to infer, as a fact, that he sent the fish on a special contract embodying the terms contained in it, unless the plaintiff, before he sent the fish, unambiguously dissented from the terms, and the defendants acquiesced in his dissent. A verdict having been found for the defendants on the two issues above mentioned,—it was held that the direction was right, under the circumstances; that the statute 11 G. 4 & 1 W. 4, c. 68, s. 4, was confined to public notices; that the jury might rightly infer, from the plaintiff's having special notice that fish would not be taken except on certain terms, and that no one had power to vary the terms, and from *818] his afterwards persisting in sending his fish, that he assented to a special contract to carry on these terms; and that the defendants were in that case protected by this special contract, under s. 6. This state of the law was found inconvenient, and the act of parliament in question (17 & 18 Vict. c. 31) was passed, upon which the court is now for the first time called upon to put a construction. [JERVIS, C. J.—You admit, that, but for that act, you are out of court?] No doubt. The statute begins with a recital, that it is expedient to make better provision for regulating the traffic on railways and canals. And the 7th section,—upon the construction of which the question will turn,—enacts that “every such company as aforesaid shall be liable for the loss of or for

any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any *notice, condition, or declaration*, made and given by such company contrary thereto, or in anywise limiting such liability: every such *notice, condition, or declaration* being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such *conditions* with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be *just and reasonable*: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned, that is to say, for any horse 50*l.*, for any neat cattle, per head 15*l.*, for any sheep or pigs, per head 2*l.*, unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be *respectively of higher value than as above mentioned, in which [*819 case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge: and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 G. 4 & 1 W. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of value of such animals, articles, goods, and things, and the amount of injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no *special contract* between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 G. 4 & 1 W. 4, c. 68, with respect to articles of the description mentioned in the said act." The contention on the part of the company will be, that it is competent to them to make *any* contract, provided it is signed. That, it is submitted, is nullifying all the former part of s. 7. [CRESSWELL, J.—The meaning is, that a special contract shall only be evidenced by a writing signed,—like the 9 G. 4, c. 14, s. 1, which provides that no acknowledgment shall be sufficient to take a case out of the statute of limitations, unless it be in writing and signed by the party to be charged thereby.] The contract must be signed; and, if it be one protecting

*820] the company against *the consequences of their own default, it must also be just and reasonable. In *Wise v. The Great Western Railway Company*, which will probably be relied on for the defendants, it was not necessary to decide whether or not the case was within the notice: the company had performed all that they were bound to do. It will be urged that the replication is defective for not alleging that the condition was unjust or unreasonable: but it is submitted, that, coming as it does by way of proviso, it was for the defendants to aver it. [CRESSWELL, J.—It is all contained in one section.] In *Wells v. Iggulden*, 3 B. & C. 186 (E. C. L. R. vol. 10), 5 D. & R. 13 (E. C. L. R. vol. 16), Holroyd, J., says, “The exception is totally separate from the enactment. It was not, therefore, necessary for the plaintiffs to negative it. Had it formed a qualification of that which went before, and been incorporated with it, then it would have been necessary, according to the rule laid down in *Stowel v. Lord Zouch*, Plowd. 376, and *Newis v. Lark*, Plowd. 410.” And Bayley, J., adds: “Upon that point I have no doubt: statutes are not divided into sections upon the rolls of parliament,(a) and therefore the mere placing of the proviso in the same section of the printed act does not make it necessary to notice it in pleading, unless it is also incorporated in the enacting sentence.” Assuming that it is for the court to judge of the reasonableness of the limitation, it is submitted that the 4th article, which declares the company to be irresponsible for loss of or damage to goods insufficiently packed, whether such loss or damage results from the insufficient packing or not, is clearly unreasonable. [CRESSWELL, J.—May not the company reasonably enough say they decline to discuss the cause of the loss or damage in such cases?] The insufficiency of the package surely *821] could be no answer to a charge of loss by *negligence. [WILLIAMS, J.—Take the ordinary exception in a policy of insurance, “if the ship be stranded.” That applies whether the loss is attributable to the stranding or not.] Then, the other part of the clause, which limits the time for making a claim for loss or damage to three days, is unjust and unreasonable. The party may be unable within the time to discover the loss. [CRESSWELL, J.—On the other hand, it is difficult for the company to trace a package after a long interval.] The 15th article,—that the company will not be responsible for loss or damage to goods conveyed at special or mileage rate, *however caused*,—is also unreasonable. It is a complete evasion of the act of parliament. [CRESSWELL, J.—I do not see anything necessarily unreasonable in that.] *822] *Pearce*, for the defendants.(b)—Upon the true *construction of the 7th section of the 17 & 18 Vict. c. 31, the company are

(a) This, though true formerly, has ceased to be so since the session of 1849. Vide 11 C. B. 466 (c) (E. C. L. R. vol. 73).

(b) The points marked for argument on the part of the defendants were as follows:—

1. On the argument of the demurrer to the second replication to the third and fourth pleas:—“That the Railway and Canal Traffic Act, 1854, does not affect contracts between a railway com-

not responsible for the loss in question. The notice and condition upon which the company profess to carry, when brought home to the consignor of the goods, and signed by him, ceases to be a mere notice, and becomes a special contract. Under the 11 G. 4 & 1 W. 4, c. 68, it had been held that a notice brought home to the party constituted a special contract. Construing the 7th section of the statute now under consideration in *pari materia* with that act, it is clearly competent to the company to make a special contract for the conveyance of goods, provided that the contract be signed. The distinction between a mere notice and a contract is pointed out in the case of *Walker v. The York and North Midland Railway Company*, 2 E. & B. 750, 759 (E. C. L. R. vol. 75), where Lord Campbell says: "It seems to be contended by Mr. Cowling, that, since the statute 11 G. 4 & 1 W. 4, c. 68, it is not lawful to make a special contract limiting the liability of a carrier; but I am clearly of opinion that the legislature had no such intention, and that such is not the operation of the act. Section 4 in effect says, that a carrier shall not limit his liability merely by a public notice, but leaves it open to him to limit his liability by a special contract." And Wightman, J., expresses himself in similar terms; saying,—"*I do not think it (i. e. the statute) applicable to a notice specifically delivered to a particular person to form the basis of a special contract with him.*" If, therefore, the notice under the Carriers Act applied to public notices only, the same expression in the recent act must be held to have reference to the same sort of notice. In **Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707,† it was held that a contract [*823 entered into with a common carrier by the party who delivers goods to be conveyed, by which contract the carrier is exempted from all liability for any loss occasioned by his negligence, is binding upon both parties. And Martin, B., says: "No doubt, at common law, a carrier may enter into a special contract. He may, it is true, be bound to carry goods; and, if he refuses to do so except on the terms of a special contract, he may subject himself to an action for that breach of duty; but, if a special contract be entered into by him and the party sending the articles to be conveyed, both sides are bound by the terms of the contract." In

pany and another party respecting the receiving, forwarding, and delivering of goods, signed by such party or the person delivering such goods to the company for carriage:

"That the contracts in the third and fourth pleas mentioned are valid in law:

"That notices, conditions, and declarations made and given by a railway company respecting the receiving, forwarding, and delivering of goods, are not made void by the said act, unless such notices, conditions, and declarations are unjust and unreasonable; and that the plaintiff should have averred that, and shown why, the conditions of the contracts in the third and fourth pleas mentioned are unjust and unreasonable:

"And that the conditions of the contracts mentioned in the third and fourth pleas are just and reasonable."

Defendants' points of argument on plaintiff's demurrer:

2. On the argument of the demurrer to the rejoinder to the second replication to the third and fourth pleas:—"That the reasonableness of the conditions is not to be determined by the court upon the pleadings alone, but upon the facts of the case, being found by a jury, or admitted by the parties; and that the rejoinder does not refer matter of law to the jury."

Wise v. The Great Western Railway Company, a note of which is to be found in the Weekly Reporter for May 17, 1856 (p. 551), a rejoinder setting up a signed notice of this sort was held to be a good answer to a replication relying upon the Railway and Canal Traffic Act, 1854. In the course of the argument there, Alderson, B., says: "It would be highly absurd if the legislature were to prohibit parties from entering into any contract they please." And Bramwell, B., adds: "I think so too. It would be monstrous for an act of parliament to say you shall not contract for the carriage of cattle but on these terms." And in giving judgment, Pollock, C. B., says: "We think that the mischief was within the notice, and that, the horse being accepted under the special contract of the railway company not being liable for any damages that might be done to him while remaining there until somebody came for him, or made an application about him, it must be taken as part of the whole matter of sending him from one place to another." 2. The next question is, whether these conditions are just and reasonable. It is submitted, that there is nothing on the face of them to show that they

*824] are not so. The third plea states, that the defendants received the furniture, &c., subject to a special contract signed by the plaintiff, whereby it was agreed that the defendants should not be answerable for the loss of or damage to the same if insufficiently or improperly packed, and that the said packages of furniture, &c., were insufficiently and improperly packed. Insurers are protected by certain implied warranties. If carriers are insurers, there is no reason why they should not have the benefit of insurers. [JERVIS, C. J.—What has the insufficiency of the package to do with the detention of the goods?] It may be that one package may contain a number of small parcels, and that, by reason of its insufficiency, some of these may have been lost. [JERVIS, C. J.—What do you say to the latter part of the fourth article, as to the three days' notice?] No question arises upon that on these pleadings. [JERVIS, C. J.—The fourth plea is founded upon the 15th article, which provides, that, where the goods are conveyed at special or mileage rate, the company will not be responsible for loss or damage, however caused. I think they had a right to make a regulation as to that; and that the fourth plea is a good answer to the action. As to the third plea, you will have to satisfy us that the improper or insufficient package of the goods justifies their detention.] The object of the fourth article evidently is, to avoid the inconvenience of entering into a contest in each case as to the cause of the loss. There is nothing at all unreasonable in that. The defendants are entitled to judgment on the whole replication. This is an exception, and not a proviso,(a) and the words do incorporate it. At all events, if necessary, the court will allow the rejoinder to be amended in this respect. [CRESSWELL, J.—If it is set out, and it is for the court, it is not necessary to aver it. JERVIS, C. J.—I think it is quite sufficiently brought

(a) See *Bousfield v. Wilson*, 16 M. & W. 185, 187.†

*before us.] As to reasonableness, the case of *Mac Andrews v. The Electric Telegraph Company*, 17 C. B. 8 (E. C. L. R. vol. [*825 84), is an authority in favour of the defendants. [JERVIS, C. J.—There is no doubt as to the fourth plea.]

Honyman, in reply.—As to the fourth plea, the 15th article is an attempt to evade the provisions of the 17 & 18 Vict. c. 31, which never could have been intended to enable the company to protect themselves by a special contract against the consequences of their own negligence or default. [JERVIS, C. J.—The statute means this:—The carrier shall no longer be able to protect himself by a notice: but that is not to prevent him from making a special bargain, provided it is just and reasonable, and provided it is signed.] The replication here avers that the loss was occasioned by the default or neglect of the company. This is attempted to be met by a rejoinder that the conditions in the replication mentioned were just and reasonable. If there be any one of those conditions which is unjust or unreasonable, the whole rejoinder is bad.

JERVIS, C. J.—The next case,—The London and North Western Railway Company, App., Dunham, Resp.,—involves very nearly the same point, and therefore we had better hear that case argued before we pronounce our judgment in this case. See the next case.

*THE LONDON AND NORTH WESTERN RAILWAY COMPANY, Appellants; ROBERT CLARKE DUNHAM, [*826 Respondent. *June 18.*

A case sent by a county court judge for the opinion of this court, stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff,—“Risk note. London and North Western Railway Company. Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners. Delivered to London and North Western Railway Company, from R. C. Dunham (the plaintiff), 3 crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk:”—

Held, that the court could not from this statement judge whether or not the condition was “just and reasonable,” within the 17 & 18 Vict. c. 31, s. 7.

THE plaintiff (the respondent) in this case is a meat-salesman, and brought his action in the county court of Lancashire holden at Liverpool, to recover from the London and North Western Railway Company 50*l.*, the loss alleged to have been sustained by him in consequence of the non-reception within a reasonable time of certain meat delivered in Liverpool on the 19th of December, 1855, to be forwarded by the defendants' (the appellants') railway to the plaintiff's agent in London. The amount of damages to which, if to any, the plaintiff was entitled, was found by the judge of the county court to be 25*l.* The judge of the county court further found, that this sum, viz. 25*l.*, represented the

amount of injury done to the meat by delay in the forwarding and delivery thereof; and that such injury was occasioned by the neglect and default of the defendants and their servants, who did not forward or deliver the meat within a reasonable time after it was intrusted to them.

The "Risk note" hereto appended was signed by the plaintiff at the time the meat was delivered to the defendants:—

"No. 247.

"[Risk Note.]

"London and North Western Railway.

"Park Lane Station, December 19th, 1855.

"Hay and straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners.

*827] *"Delivered to London and North Western Railway Co.

"From R. C. Dunham,

"3 crates beef,

"for F. C. Duckworth, Newgate Market.

"To be forwarded from Liverpool to London, at owner's risk.

"R. C. DUNHAM,

"Owner, or on the owner's behalf."

This risk note was retained by the defendants, and a duplicate thereof, signed by one of the servants of the company, was handed to the plaintiff.

The judge of the county court found that the conditions contained in the risk note, limiting the liability of the railway company, were unjust and unreasonable.

The defendants alleged that they were not liable for any injury occasioned by such neglect or default as aforesaid; and that they were protected from any such liability by the terms of the risk note or special contract so signed as aforesaid.

The plaintiff denied that the defendants were so protected.

The judge of the county court gave a verdict for 25*l.* in favour of the plaintiff, but directed that execution should be stayed in this and another similar case, until the opinion of one of the superior courts should be ascertained.

Bovill, for the appellants.—This is a special contract to carry from Liverpool to London "at owner's risk." There is nothing in the recent act to prevent such a contract as this being made. That act deals with notices only, and not with contracts. The whole of its provisions point to things done by the company themselves, without reference to the parties dealing with them. The legislature evidently considered a special
*828] contract something different from a protection by notice. *The first part of the 7th section speaks of "notice, condition, or declaration;" the second part speaks of "conditions" only; and no mention

is made of "special contracts," until you come to the end. "Notice" means the common carrier's notice; and "condition" means conditions or limitations made or imposed by the company themselves, and not special contracts made between the two parties. [JERVIS, C. J.—I think this case must go back to be re-stated. We have no materials to enable us to determine the question submitted to us.]

Unthank (with whom was *H. J. Mills*), *contra*.—It is submitted, that, since the statute 17 & 18 Vict. c. 31, no contract can be made by a railway company to protect itself against the consequences of its own neglect or default,—whether just and reasonable or otherwise. The first branch of the section in distinct terms declares that every notice, condition, or declaration,—or, in other words, any contract whatever,—which excuses the company from the consequences of their neglect or default, shall be null and void. How can the court say that a contract is just and reasonable which the legislature has emphatically declared to be null and void? Then the second branch of the section goes on to provide that any condition which does not affect to excuse their neglect and default may be made, provided it is just and reasonable. The company are absolute insurers even against accidental fire, which they cannot control. It is competent to them to make provisions protecting themselves against losses arising from *vis major*. It is competent to them to require that *aqua fortis*, vitriol, gunpowder, and such like dangerous and inflammable articles, shall be packed in a particular way. Conditions of that sort may be binding, though not in writing: but, where they seek to rely upon a special contract, it must be in *writing and signed. The [829 latter part of the 7th section does not destroy the effect of the first part. Is a condition a special contract? [JERVIS, C. J.—Yes.] If so, the clause as to reasonableness is useless.

JERVIS, C. J.—The intention of the legislature in passing the act in question, 17 & 18 Vict. c. 31, was, to place the whole railway system under the control of the court. The earlier sections give the court very large power over the contracts made by companies with the public. The intention of the 7th section seems to have been mainly directed to prevent the ordinary published notice from resulting in or being construed as a special contract, where the public could carry in no other way. The fair meaning of the section, as it seems to me, is this:—The first branch of it declares that all notices, conditions, or declarations made and given by the company shall be null and void, in so far as they go to release the company from liability for loss of or injury to goods, &c., in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide in the next branch, that this shall not prevent the company from making such conditions, which shall be adjudged, by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. And, further, though just and reasonable, such condition

or "special contract" shall not be binding unless signed by the person sending or delivering the goods. The result seems to be this,—A general notice is void: but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and, whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature *830] have thought fit to impose the further security, that the court *shall see that the condition or special contract is just and reasonable.

Applying that rule to the case of *Simons v. The Great Western Railway Company*, I think the matter is sufficiently brought before the court to enable us to decide it, and that the fourth plea, which states that the goods were received by the company to be carried at a certain special mileage rate, and under and subject to a special contract (referring to the 15th article of the conditions set out in the replication), is a good plea. As to the third plea, I think that is a bad one, inasmuch as it seeks to relieve the company from the consequences of the loss or non-delivery of the goods, by reason of insufficient or improper package, which in my judgment is not reasonable as a ground of relief. I think the court is bound to look at the particular matter in each case, to see whether the condition is just and reasonable or not.

As to the case of the *Great Western Railway Company, App., Dunham, Resp.*, the same reasons to a certain extent will apply. In order to see whether or not the contract be just or reasonable, it is necessary that we should be furnished with proper materials. The judge of the county court has referred it to us to say whether or not the conditions contained in the "risk note," limiting the liability of the company, were unjust and unreasonable, without telling us the circumstances under which the contract was made, or what is the nature or the reason of the particular risk. I therefore think enough is not disclosed to enable us to come to any conclusion as to whether or not the contract or condition is just and reasonable.

For these reasons, I think, that, in the first case, our judgment ought to be for the plaintiff upon the issue in law raised upon the third plea, and for the defendants as to the fourth plea: and that the second case must go back for the purpose of being more fully stated.

Rules accordingly.

IN THE EXCHEQUER CHAMBER.

DENDY *v.* SIMPSON. *June 13.*

Upon a question whether a piece of waste land, lying between a highway and the plaintiff's enclosed land, belonged to the plaintiff, or to the lord of the manor:—Held, that grants by the lord of other slips of waste land on either side of the same road, abutting on enclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the locus in quo was part of the waste of the manor, without showing continuity.

THIS was an action for breaking and entering a close of the plaintiff (below) situate in the parish of Hendon, in the county of Middlesex, and at the time of the alleged trespasses known as Chamberlain Field, otherwise Fourteen Acre Field, and pulling down, damaging, prostrating, removing, and converting to his own use, and spoiling, divers posts, rails, &c., of the plaintiff then being upon the said close; whereby the said close was much deteriorated in value, and the plaintiff disturbed in his beneficial enjoyment thereof, &c.

Plea, that the said close, at the time of the committing of the said alleged trespasses, was the close, soil, and freehold of the defendant (below), wherefore the defendant entered upon the said close, and removed the said posts, rails, &c., which were then upon the said close, and encumbering the same. The plaintiff (below) joined issue.

At the trial, before Jervis, C. J., at the sittings at Westminster after Michaelmas Term last, it appeared that the lord of the manor of Hendon, in the county of Middlesex, was entitled to the waste lands within the said manor; and that the said close in which, &c., in the declaration mentioned, was locally within the ambit of the said manor, and was formerly a small strip of land lying between certain freehold land, also within the ambit of the said manor, belonging to General Dalmer, and occupied by the plaintiff as tenant to General Dalmer, and [*882 a public highway called Hall Lane, in the said manor of Hendon, leading from a place in the said manor called Church End, to a road in the said manor called Page Street; and that the said close in which, &c., lay alongside the said highway; and that the same close had formerly been unenclosed and lying open to the said highway, but that it was enclosed by the plaintiff, then being the tenant of the said adjoining land, between seven and ten years before the committing of the alleged trespasses mentioned in the declaration, and had ever since remained so enclosed, and been occupied by the plaintiff with the said adjoining land until and at the time of the committing of the trespasses by the defendant.

The defendant called as a witness one Samuel Frederick Dendy, an attorney, who stated he was brother to the defendant, who was a barrister, and lord of the manor of Hendon; that he (the witness) was the

steward of the said manor, and had been so since the year 1846, during which time he had held courts and received rents for the defendant as lord of the said manor; that the manor was devised to the defendant by his father, who died in 1846; and that the close in question was within, and within the ambit of, the said manor.

The defendant also gave evidence to prove that his father, who was also an attorney, had as lord of the said manor held courts for the said manor eleven years ago; and that the lord was entitled to the waste lands within the manor.

The defendant then called as a witness one John Cooper, who stated that he was bailiff of the manor, and had been so for six years, but that he had known the manor for thirty years; that he knew a piece of waste land, an enclosure, at Church End aforesaid, close by the church, *833] in the possession of Mr. Thomas Nicoll, *of Copt Hall, and another piece of waste land also at Church End aforesaid, in possession of Mr. Nicoll, a bricklayer; that he also knew the close in question; that it was half a mile from Copt Hall, along the aforesaid road all the way, and that the fences of the fields were up to the road all along the road until coming to the place in question; that he also knew a place called Slattens, about two hundred yards from the plaintiff's field, and lying on the right-hand side going from Church End aforesaid to Page Street aforesaid; and that there was a long piece of enclosed land, called the Long Slip, by the road-side, between the road and Slattens, and that Slattens did not abut upon the road; that he also knew a piece of land at Church End aforesaid which had been enclosed; and that this was situate within the said manor of Hendon, and was about a quarter of a mile from the close in question, and along the side of the same road by which you go to that field.

And thereupon the counsel for the defendant proposed to prove that the said close in which, &c., was parcel of the waste of the said manor, and, for the purpose of doing so, tendered and offered to prove and give in evidence five of the rolls of the court-leet with view of frankpledge and general court baron of the lords for the time being of the said manor, held in and for the said manor before the steward for the time being of the said manor, which rolls were as follow:—

"Lib. 35, fo. 60.
"Manor of Hendon
in the county of Middlesex.
"14th May, 1782.

*834]

The court-leet or view of frank pledge, with the general court baron of the Right Hon. Charles Lord Camden, the Right Hon. Richard Rigby, John Pattison, and Henry Wallis, Esquires, held in and for the manor aforesaid on Tuesday next *before the day of Pentecost, that is to say, the 14th of May, 1782, before Thomas Wyld, Esq., steward thereof.

"At this court the homage gave leave and consent that Joseph Nicoll, one of the customary tenants of this manor, enclose ten poles of ground,

part of the waste belonging to the lords of this manor, including the pond, situate at Church End, within this manor, with the lord's consent.

"Afterwards, at this court and sitting, comes the said Joseph Nicoll into court in his own proper person, and humbly prays the lords of this manor to admit him tenant to All those said ten poles of waste ground, including the said pond, and liberty to enclose same. To whom the lords of this manor, by their said steward, do grant and deliver seisin thereof by the rod, according to the custom of this manor (but not to enclose the said pond so as to prevent all or any of the tenants of the lords of this manor making use thereof for watering of cattle, but to leave a sufficient part thereof open for that purpose), To hold to the use of the said Joseph Nicoll, his heirs and assigns, for ever, to be held of the lords by the rod, at the will of the lords, according to the custom, at and under the yearly rent of 1s., fealty, suit of court, and all other services: And he gave to the lords for a fine, as appears in the margin.

"Maner. de Hendon, in com. Middlesex.
(Lib. No. 25, fo. 128.)

"19th May, 1702.

Reddit. 6d.

Fine 10s.

Visus franci plegii cum cur. baron p̄nobil. viri Willi. Herbert, aī, al. dict̄ dñi Mountgomery, dñi manerii p̄d. ibm̄. ten̄ in et p̄ eodem manerio, die Martis prox. ante festū Pentecoste, selt. decimo nono die Maii, anno Dñi, 1702, coram Henrico Chauncy, mil., servient̄ ad legem, señllo ibm̄.

*"Ad hunc cur. compēt et p̄sent̄ per homaḡ ejusdem cur., [*835 sup sacramentū eoī, quod dñus manerii p̄d., cum assensu et consensu homagii p̄d. super humilem peticoem Edwardi Allen, un customaf teneī hujus manerii, ex gratia et favore suo per senellum p̄d. concessit et liberavit eidem Edwardo Allen, sefam p̄ virgam de uno messuagio sive stabulo erect̄ et edificat̄ super vastum apud quendam locum infra hoc maner̄, coīter vocat̄ Le Church End, Heñd. et tenend. messuag. p̄d., cum pertinen̄, eidem Edwardo Allen, heredibus et assig. suis in perpet̄m, de dño, per virgam, ad voluntat̄ dñi, sc̄dum consuet̄ manerii p̄d. p̄ annuat reddit̄ vi. d. fid., sect̄ cur̄, et al. serviç inde prius debīt, et de jure consuet̄, et p̄ ingrū suo inde dat̄ dño de fine put̄ patet, &c., et admissus est inde tenens, et fecit fidelitatem."

"Maner. de Hendon, in Com. Middlesex.
"Roll 25, fo. 94.

Cur̄ baron̄ p̄nobil. viri Williel. Herbert, aī, comūnit̄ vocat̄ dom̄ Mountgomery, dom̄ maner̄ p̄d., ibm̄ ten̄ in et p̄ eoī manerio, die Martis ante festum Scti Catheriñ existē, decimo nono die Nōbris, annoq, Dom̄ 1700, annoq, regn̄ Dñi n̄r Williel. Tertii, Dei grā Angl. Scot. Franc. et Hiberñie Regis, fidei defensā, &c., duodecimo, coram Henrico Chauncy, mil. servient̄ ad legem, seneschal. ibm̄, ab inde adjournat̄ vsq, ad tertiam diem Decemb̄ p̄ sequen̄, et ab inde tunc adjournat̄ vsq, ad diem Martis decim. quart̄ die Januaf p̄ sequen̄.

"Ad hanc cur̄ compēt et p̄sentat̄ est p̄ homaḡ ejusd̄ cur sup sac̄m

eor^q Dom. maner^ē p^d p et cum assensu et cōsensu homag^ē p^d sup humil. peticōn Benjamin Browne vn customar^ē teneⁿ maner^ē p^d, ex *836] grā et favor suo *p seneschal. suū p^d concessit eid^ē Benjamin Browne, hered^ē et assignat^ē suis, totam ill. peciam sive pcellam terræ vasti manerii de Hendon p^d, adjungeⁿ ad tenemeⁿ vocat^ē y^e Garden Plott, prope Ecclesiam pochialem de Hendon p^d, contineⁿ vñ ptical^ē, sive plus sive minus, sicut ead^ē pcell. terr^ē inclus^ē est cum fossa ex vasto, cum oib³ et singul. ptinentiis eid^ē pcell. spectat^ē vel ptineⁿ. Et postea ad istam eand^ē cu^m venit p^d Benjamin Browne in p^pr psoⁿ sua, et humil^{it} petit se admitti teneⁿ ad pmiss^ē p^d, cum ptin^ē. Cui Dom^u p seneschall. suū p^d concessit ac liberavit inde seisiⁿ p virg^ē, Hend^ē et tenend^ē pmiss^ē p^d, cum ptin^ē, eid^ē Benjamin Browne, hered^ē et assign^ē suis in ppetuum, de Dom^u, p virg^ē, ad vo^l Dnⁱ, secund^ū cons^ē maner^ē p^d, p fid^ē, sec^ū cu^m, et annual redd^ē ld., et al. servi^o inde prius debi^t et de jure consue^t; et p ingrū suo dat Dom^u. de fñ put patet. Et adm^ē est inde teneⁿ, et fecit fid^ē.”

“Maner. de Hendon,
in Com. Middlesex.
” Roll 27, fo. 22.

Cu^m baron pⁿobil viri Will^m Herbert, arm^ē, coⁿter vocat^ē Ducis de Powis, Dñi maner^ē p^d, tenen^t in et p maner^ē p^d, vicessimo nono die Novembris, anno Dñi milimo septuagesimo decimo sexto, cor^ā Knighly D’Anvers, arm^ē sen^t ib^m.

“Redd. 1s.
” Fin. 11. 1s. 6d.

“Ad hanc cu^m venit Joh^ēs Griffith, customar^ē tenens hujus maner^ē, et humilime petit de Dño sibi concedere peciā vasti Dñi, contineⁿ in longitud^ē quatuor ptical^ē, et in latitudine dimid^ē uñ ptical^ē, muro gardiⁿ Ed^ri Allen adjungeⁿ, p^pe cemiteriū. Et sup^{er} hoc comptū fuit p homag^ē q^d non erit ad damnū Dñi sive tenentiū suor^ū, tal concessioⁿ face^r, ideoq^{ue} Dñus, p senes^t suū p^d, concessit ad Johaⁿ Griffith peciam vasti p^d, et eid^ē libāvit inde seiⁿam p virgā, Habend^ē et tenend^ē eid^ē Johaⁿ, hered^ē et assign^ē ejus imppm^ē, tenend^ē de Dño p virgam, ad volunta^ē Dñi scdm^ē *837] consuetud^ē manerii p^d, p annual redd^ē uñ solid^ē, *fide^l, sec^ū cu^m, et af^{te} servi^o inde prius debi^t et de jure consue^t. Et dat Dño p fine put patet in marg^e, et admis^ē est inde tenens, et fecit fide^l.”

“Lib. 32, fo. 159.
” Maner of Hendon in
the county of Middle-
sex.

“3d Dec. 1755.

“The general court baron of the Right Hon. Henry Arthur, Earl of Powis, Edward Herbert, Esq., and Brook Forrester, Esq., lords of this manor, holden in and for this manor on Wednesday, the 3d day of December, in the year of our Lord 1755, before Thomas Wyld, gentleman, steward of this manor.

“Whereas, at a court leet or view of frank-pledge with a court baron held in and for this manor on the 5th day of June, 1753, it was found and presented by the then homage, that, on the 16th day of December, 1752, John Nicoll, late of Page Street, in the parish of Hendon, in the county of Middlesex, Esq., deceased, late one of the customary tenants of this manor, had out of court duly surrendered all and singular the

customary messuages, cottages, lands, tenements, and hereditaments of him the said John Nicoll within the said manor, to the use of his last will and testament in writing: and afterwards, at the same court, it was found and presented by the same homage, that the said John Nicoll died seised of several copyhold lands and tenements holden of this manor by copy of court-roll, but the particulars thereof they knew not, nor who was his heir or entitled thereto; whereupon the first proclamation was made, &c., but no person then came, &c.: And whereas, at a general court baron held in and for this manor on the 14th day of December, 1758, the second proclamation was made, &c., but no person then came, &c.: And whereas, at a general court baron held in and for this manor on the 4th day of March, 1754, James Ingram, of Barnet, in the county *of Middlesex, doctor of physic, was admitted tenant for life under [*838 the will of the said John Nicoll, deceased, to all and singular the copyhold messuages, cottages, lands, tenements, and hereditaments thereby devised to him for and during the term of his natural life: And whereas at a court-leet or view of frank-pledge with a court baron held in and for this manor on the 13th day of May, 1755, it was found and presented by the then homage, that the said James Ingram died seised of certain customary lands and tenements holden of the lords of this manor by copy of court-roll, but who was his heir, or entitled thereto, they knew not; therefore the first proclamation was made, &c., but no person then came, &c., as appears by the rolls of the said courts: Now, at this court, comes John Nicoll, of Hatton Garden, in the county of Middlesex, Esq., and brings into court the probate in writing of the last will and testament of the said John Nicoll, deceased, bearing date the 6th day of May, 1751, whereby it appears that the said John Nicoll, deceased, did (inter alia) devise in the words following, to wit, 'All that my estate at Page Street, in my own occupation, and all that my farm called Cooks, in the holding of Daniel Nicoll (not already devised), and all other my estates not already disposed of, I give to my brother-in-law, Dr. James Ingram, of Barnet, for and during the term of his natural life, subject to impeachment for waste, and not to fell timber; and, after his decease, to John Nicoll, of Hatton Garden, my godson, his heirs and assigns, for ever,' as in and by the said will, relation being thereunto had, will appear: Whereupon the said John Nicoll of Hatton Garden humbly prays the lords of this manor to admit him tenant to all that piece or parcel of ground, waste of the manor aforesaid, lying before the aforesaid messuage called Copt Hall, containing by estimation five perches and ten feet in length, and four perches and four feet in *breadth, [*839 more or less, and three elme trees thereupon growing, as the same parcel of land is enclosed with posts and rails, with the appurtenances, other parcel of the premises devised as aforesaid, to which the said John Nicoll, deceased, was admitted at the said last-mentioned court: To which said John Nicoll of Hatton Garden the lords, by the

hands of their said steward, grant and deliver seisin thereof by the rod, To have and to hold the same premises, with the appurtenances, unto the said John Nicoll, his heirs and assigns, for ever, to be held of the lords by the rod, at the will of the lords, according to the custom of the said manor, by the yearly rents and services heretofore for the same due and of right accustomed. And he is admitted tenant to the said premises accordingly.

“And the said John Nicoll, of Hatton Garden, also humbly prays to be admitted tenant to all that piece or parcel of ground, waste of the manor aforesaid, lying before the tenement aforesaid, called Slattons, containing by estimation forty perches in length, and three perches and ten feet in breadth, more or less, and forty-four elms thereupon planted and growing, with the appurtenances, other parcel of the premises devised as aforesaid, to which the said John Nicoll, deceased, was also admitted at the said last-mentioned court: To which said John Nicoll, of Hatton Garden, the lords, by the hands of their said steward, grant and deliver seisin thereof by the rod, To have and to hold the same premises, with the appurtenances, unto the said John Nicoll, his heirs and assigns, for ever, To be held of the lords by the rod, at the will of the lords, according to the custom of the said manor, by the yearly rents and services theretofore for the same due and of right accustomed: And he is admitted tenant to the said premises accordingly.”

*840] And the counsel for the defendant also tendered and *offered and proposed to give in evidence, for the like purpose, upwards of two hundred other entries on the rolls of the said manor, at courts held at various times before the stewards for the time being of the said manor, that is to say, seventy-six rolls of courts held between the years 1700 and 1750, eighty-four rolls of courts held between the years 1750 and 1800, and eighty rolls of courts held between the years 1800 and 1850, relating to grants and admissions had by the lord to the lands in the said manor, described in such rolls as “waste.”

Whereupon the counsel for the plaintiff interposed, and insisted that the said evidence so offered was not good or admissible in law upon the issue aforesaid, and prayed the said Chief Justice to reject the same.

The defendant's counsel, in answer to a question from the Lord Chief Justice, having stated that he offered this evidence solely for the purpose of proving *that the close in question was part of the wastes of the manor*, and not for the purpose of proving that there were wastes of the manor, and that the lord was entitled to them,—the said Lord Chief Justice then held and adjudged that none of the said rolls was admissible for the purpose for which the same were so offered, and then rejected and refused to receive the same for that purpose, and refused to allow the said rolls to be put in for that purpose, and then directed the jury to find for the plaintiff upon the said issue.

The defendant's counsel thereupon excepted to that rejection and

ruling of the said Lord Chief Justice with respect to the evidence so tendered by the defendant for the purpose aforesaid: And the jury found their verdict for the plaintiff.

The exceptions now came by writ of error to this court, and were argued before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., Martin, B., and Bramwell, B.

**Honyman*, for the plaintiff in error.—One or more of the pieces of evidence which the Lord Chief Justice rejected, clearly was admissible for the purpose for which it was tendered, viz. to show that the locus in quo was part of the wastes of the manor,—to rebut the presumption that the strips of waste on the sides of the road were the property of the adjoining freeholders. [ALDERSON, B.—Must you not show the whole to have been part of one waste?] Not necessarily. In *Doe d. Barrett v. Kemp*, 7 Bingh. 332, 5 M. & P. 173, a new trial was granted on the ground of the rejection of evidence similar to that offered here. The cause went down again; and the same evidence was again tendered, and received by Lord Lyndhurst, C. B.; and the case afterwards came before this court on exceptions to that ruling, when it was distinctly held, —2 N. C. 103, 2 Scott, 9,—that, upon a question whether a piece of waste land between a highway and enclosures belonged to the plaintiff, the owner of the adjoining enclosure, or to the lord of the manor, the latter might give evidence of grants by him of the waste between the road and the enclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence were confined to the road which passed by the spot claimed by the plaintiff. [COLERIDGE, J.—What was the ground of objection to this evidence at the trial?] That the defendant failed to show unbroken continuity or connexion between the strips of land in question and the other wastes of the manor. That, however, clearly, was not necessary. Lord Denman, in giving the judgment of the court of error in *Doe d. Barrett v. Kemp*, says: “The evidence consisted of grants or licenses to enclose, made by the defendant, the lord of the manor, at the manor court, to six different persons: to Clarke, Bolton, and Gilbert, where the pieces of ground are described as in Long Row Road, which is in the road before *mentioned as beyond the bridge, and distant two miles from the locus in quo; [three other grants, to Hunt, Harrison, and Spurden, in which there is no description of their locality; they are merely called waste land, and are situate within the manor. As to all the six, it was in evidence that they were lying between the land of other persons and the highway. It appears from the plan produced at the trial, which has been annexed to the bill of exceptions, that a space of sixty or seventy yards between the cottages in question and the bridge, is occupied by houses, which are described as old houses. It is not stated in the evidence reported in this case, as on the first trial, that the road by the sides of which these slips are situated terminates in a large common. The question for our con-

sideration is, whether all these grànts of permission to enclose were admissible in evidence? These grants were, we apprehend, the acts of ownership which were offered in evidence on the first trial, and rejected, and the new trial granted; the Court of Common Pleas being of opinion, as would seem from the report, that all of them ought to have been received. The ground upon which it has been contended by the counsel for the defendant that they were admissible in evidence, is, that there was a unity of ownership, and a unity of character between the locus in quo and the several pieces of land which were comprised in those grants; that, adjoining to the locus in quo, an enclosure had been made by a person of the name of Start on a slip in front of the defendant's own land, between that and the road, under a grant by the defendant as lord of the manor,—that grant reserving a small rent; that piece is called in the grant 'Pound Green:' that, in continuity (*though not in unbroken continuity*, because the bridge and the old houses intervene), there are slips of green for a very considerable distance, more than two miles, *843] upon various parts of which the lord of the manor has *exercised acts of ownership; and that this affords strong presumption that the lord of the manor is the owner of all these slips of land: further, that the other three pieces of land for the enclosure of which grants of licenses were made to Hunt, Harrison, and Spurden, being pieces of waste alleged to be lying between the lands of private individuals and the high road, there is in them a unity of character which will make these acts of ownership receivable in evidence. The judgment of the Court of Common Pleas appears to authorize the reception of all those grants in evidence; but the opinion of the court seems to have been given upon the supposition that all the pieces of waste with respect to which evidence was given, lay on the sides of a road or roads terminating in a large common, which, upon this bill of exceptions, we cannot assume. Upon the whole of the case, we think that there is a sufficient foundation laid to render the first three of the above-mentioned grants admissible, upon the ground that they are grants of parcels of one and the same waste or common, lying on both sides of the road, although the continuity of the waste is interrupted for a short distance by the intervention of the houses by the sides of the road." The other three grants were held inadmissible because there was no proof as to where they were situate. [ALDERSON, B.—The whole of this doctrine rests upon *Stanley v. White*, 14 East, 332, followed by *Jones v. Williams*, 2 M. & W. 326,† and *The Earl of Dunraven v. Llewellyn*, 15 Q. B. 791 (E. C. L. R. vol. 69).] Cooper's evidence, coupled with the entry of the 3d of December, 1755, was clearly evidence to show that the locus in quo was part of the waste of the manor. [ALDERSON, B.—Whatever the effect of the evidence, I think it was clearly admissible.]

Bovill (with whom was *Forsyth*), contrà.—The court can only deal *844] with the facts as they are stated upon the *face of the bill of exceptions: they cannot draw inferences. The ruling of the

Lord Chief Justice is sustainable on the ground upon which the decision of the Court below, as well as that of the court of error, proceeded in the case of *Doe d. Barrett v. Kemp*. Where there is continuity or similarity of character and description between the locus in quo and other strips over which the acts of ownership have been exercised, evidence such as this is admissible, upon a principle which is obvious and intelligible. But, where there is no such continuity or similarity, that principle is inapplicable. Here, the evidence does not identify Slattens, as to its position, with the locus in quo. The statement of the witness (Cooper) is, that there was "a place called Slattens, about two hundred yards from the plaintiff's field, and lying on the right-hand side going from Church End to Page Street, and that there was a long piece of enclosed land, called the Long Slip, by the road side, between the said road and Slattens, and that Slattens did not abut upon the road." There is no statement, therefore, that Slattens abutted upon the road in question, or that it abutted on a slip adjoining the road: in truth, it abuts on other enclosed land. [ALDERSON, B.—Was it not for the jury to say whether or not it was identified?] There must be *some* evidence. Suppose there had been a common at Church End,—how could acts of ownership there be evidence of ownership of slips of waste half a mile distant, in the absence of proof of similarity and continuity? Slattens belonged to the lord,—how could acts of ownership by him on land between his own enclosure and the highway, be evidence of ownership of an isolated piece of land in another part even of the same road?

ALDERSON, B.—We all think there was evidence here which the Lord Chief Justice should have *submitted to the jury, and that there must be a venire de novo. What may be the value of the evidence when received, is not for our consideration. It clearly was admissible. Venire de novo.

WALKER v. BARTLETT. June 24.

The plaintiff, the owner of 500 shares in a cost-book mine, according to the rules of which the person registered as owner in the cost-book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested the secretary to enter a transfer of the shares from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. The defendant did not cause the shares to be registered in his name; and the plaintiff, in consequence of his name being continued in the cost-book as the owner, was compelled to pay some subsequent calls:—

Held, by the Exchequer Chamber, that there was no legal obligation on the defendant to cause the shares to be registered in his name as the owner,—but that there was an implied obligation on him to indemnify the plaintiff against calls made during the time when he was virtually and potentially the owner of the shares.

A transfer of shares in a cost-book mine need not be stamped.

A contract for the sale of shares in a cost-book mine is not necessarily a contract for an interest in land, within the 4th section of the statute of frauds.

THE first count of the declaration stated that the plaintiff was possessed of five hundred shares in a certain mine called the Cefn Gwyn Mine, of which shares he was registered owner; and, in consideration that he would sell the said shares to the defendant, and execute and deliver to him a transfer thereof, the defendant promised the plaintiff to accept the same, and to pay to the plaintiff 300*l.* for the same, and to indemnify and save harmless the plaintiff from all subsequent payments and liabilities for or in respect of the said shares, or for or in respect of any calls which might thereafter be made upon them, and further that the plaintiff did sell the said shares to the defendant, and execute and deliver to him a transfer thereof pursuant to the said agreement, and the defendant *846] accepted and received the same, and *paid the said sum of 300*l.*; and that afterwards the plaintiff, as such registered owner, became liable to pay calls made subsequently to the said sale and delivery of the said shares and transfer, upon the said shares, and was obliged to pay the same; whereof the defendant had notice, and was requested by the plaintiff to indemnify him from and against the said payments; yet the defendant did not do so.

The second count stated that the plaintiff was possessed of the shares, and registered as the owner thereof, as in the first count mentioned, and that the mines were worked by a company according to the rules whereof the person registered as the owner of shares therein remained liable to calls made in respect thereof while he continued to be registered as such owner; and that, in consideration that the plaintiff would sell to the defendant the said shares, and deliver to the defendant a transfer thereof signed by the plaintiff, the defendant promised the plaintiff that he would accept and pay for the same, and cause the said shares to be registered in his the defendant's name as owner thereof, according to the rules of the said company, within a reasonable time, so that the plaintiff might be relieved from further liability in respect of the said shares; and that the plaintiff performed all things on his part to be performed, and such reasonable time had elapsed before the commencement of this suit: yet that the defendant did not cause the said shares to be registered in his name as owner thereof, but left them registered in the plaintiff's name, whereby he became liable to pay, and was compelled to pay, calls subsequently made upon them.

The third count stated that the plaintiff was possessed of the said shares, and registered as the owner thereof, according to the rules of the said company, and the defendant bought the said shares, and the plaintiff *847] delivered to him the transfer thereof as aforesaid; and *that the said mine was worked by the said company; and that, according to their rules, the person registered as the owner of shares therein remained liable to pay calls made in respect thereof, so long as he continued to be so registered, but such liabilities ceased upon his selling the said shares and the purchaser thereof being registered as the owner of the said shares, according to the rules of the said company, in the place

and stead of the former person so registered as owner as aforesaid,—of all which the defendant, at the time of the said sale and delivery of the said transfer, had notice; and that, by reason of the premises, it was the duty of the defendant to cause to be registered the said shares in his the defendant's name as owner thereof, within a reasonable time, according to the rules of the said company, but he did not do so; whereby the plaintiff was compelled to pay calls subsequently made upon the said shares.

The fourth count was for money paid by the plaintiff for the use of the defendant.

The defendant pleaded (amongst other pleas), to the first and second counts, that he did not promise as alleged; to the third, not guilty; and to the fourth, never indebted. He also pleaded to the first and third counts, denying that the plaintiff sold the shares to him, or executed or delivered to him any transfer thereof, pursuant to the agreement in those counts mentioned, or that he accepted or received the same from the plaintiff as alleged; and, to the third count, a plea denying that it became the duty of him, the defendant, to cause the shares to be registered in his name as owner thereof, according to the rules, as alleged. Issue.

Upon the trial of the cause before Williams, J., at Guildhall, on the 1st of June, 1855, it was proved that the plaintiff had been possessed of 500 shares in the Cefn Gwyn Lead Mines, in the county of Cardigan; that such mines were worked by a company upon the *cost-book principle; that, according to the rules of such company, the person registered in the cost-book as the owner of shares in the said mines was liable to pay calls made upon such shares while he was so registered; that the plaintiff was registered in the said cost-book as owner of the said 500 shares; that, being so possessed of the said shares, and registered as the owner thereof, the plaintiff, in the month of April, 1852, had paid all calls due in respect of them up to that time, being the date of the transaction between the plaintiff and the defendant, out of which the subject of this action arises.

That transaction was as follows:—The defendant being desirous of getting a bill of exchange, accepted by one George Hennet, for 1000*l.*, of which he was possessed, discounted, by his agent negotiated such discount with James Whitton Arundell, the agent of the plaintiff, who on the plaintiff's behalf agreed to discount it in the following manner:—The defendant was to take the shares in question for 800*l.*; the plaintiff was to be allowed 50*l.* as discount: the plaintiff was to pay 200*l.* in cash, to give a check and I O U for 200*l.* more, and an acceptance at a month for 250*l.*: and thereupon the following writing was signed by Arundell as agent for the plaintiff, and delivered to the defendant. It is the paper hereafter referred to as marked C. :—

	£	s.	d.
"500 Cefn Gwyn, all calls paid .	300	0	0
"Discount	50	0	0
"Cash	200	0	0
"Check, with I O U, for Thurs- day week, or next Tuesday . .	200	0	0
"Acceptance, one month . .	250	0	0
	<hr/> 1000 0 0 <hr/>		

"Bill, G. Hennett, 1000l.

"I engage to carry the above out on Thursday,

"J. W. ARUNDELL. April 6, 1852."

*849] *The bill for 1000l. was handed to Arundell, and the defend-
ant received the 200l. cash, the check, I O U, and acceptance
mentioned in the above paper writing: and the plaintiff delivered to
the defendant an unstamped document, in the following form:—

"To Mr. John Bowes, secretary of the Cefn Gwyn Silver Lead Mines.

"I hereby request you to enter on the cost-book a transfer of
500/5000th parts or shares in the Cefn Gwyn Mines to ———, and
all benefit in the said parts or shares, and all profit arising therefrom,
out of my name into the name of the said ———, subject to the
same rules, conditions, and regulations as I now hold the same; for
which this shall be your sufficient authority as secretary of the said
mines.

"EDWARD WALKER.

"Signed in the presence of }
—————

"————— hereby agree to take and accept the above shares,
subject to the same rules, conditions, and regulations.

"Signed in the presence of }
—————"

The original of this document was not produced; and the secondary
evidence was objected to, on the ground of the want of stamp; but was
admitted, subject to the defendant's objection, with leave for him to
move for a nonsuit.

It was also proved that such document was in the usual form, and
was signed by the plaintiff; but that a blank was left for the name of
the intended transferee, and that such blank had not been filled up,
nor had the defendant, or any other person, signed an acceptance of
the said shares, or taken the said document to the purser or secretary
of the said mines to have himself registered as the owner of the said
shares; that, if the defendant *had filled up the said blanks, by
*850] inserting his own name as transferee of the said shares, and had
signed his acceptance thereof, and had produced the said document to
the said secretary of the said mine, he would have been registered as

the owner of the said shares in the stead and place of the plaintiff, who would thereupon have been discharged from liability for calls subsequently made upon the said shares; but that the plaintiff remained registered as such owner, and was in consequence obliged to pay calls subsequently made upon the said shares, amounting to 375*l*.

On behalf of the defendant, it was then objected, that there was no proof of any agreement in writing for the sale or promise to transfer the shares in question, as the paper marked C. produced in evidence did not contain all the terms alleged to constitute the contract; and that such an agreement was required, as being a transfer of an interest in land. Also, that no transfer of the shares as alleged in the declaration was shown, but only a request to enter a transfer; and that, if such request amounted to a transfer, it required a stamp.

The above objections were in addition to the ground on which the judge nonsuited the plaintiff, as hereinafter mentioned: and leave was given to the defendant to move for a nonsuit on such objections, if the plaintiff should obtain a verdict.

In order to avoid the possible necessity of another trial, it was agreed that the jury should assess the damages conditionally.

The jury found that the document above set forth, requesting the secretary of the mine to enter a transfer of the said 500 shares, had been delivered by the plaintiff to the defendant, and that it was in the form above set forth; and they assessed the damages sustained by the plaintiff at 375*l*.

*The learned judge, however, nonsuited the plaintiff, upon the authority of the case of *Humble v. Langston*, 7 M. & W. 517;† [*851 but gave him leave to move to enter a verdict for him, if the court should be of opinion, that, under the circumstances of the case, he was entitled to recover.

A rule was accordingly obtained, on the ground, that, upon the facts proved at the trial, it was the defendant's duty to procure himself to be registered as owner of the said shares, within a reasonable time, or to indemnify the plaintiff against the calls which he had been compelled to pay by reason of such non-registration by the defendant; and by such rule it was ordered, that, at the time of showing cause, the defendant should be at liberty, if necessary, to argue that the nonsuit ought to be retained, or that a new trial should be had, on the aforesaid grounds of objection taken on behalf of the defendant, and on the ground that the verdict was against evidence in certain respects.

Cause was shown against the rule in Michaelmas Term, 1855; and the Court of Common Pleas discharged it on the 29th of January, 1856, on the same ground on which the judge nonsuited the plaintiff at the trial; no judgment having been given on the other grounds hereinbefore mentioned: see *Walker v. Bartlett*, 17 C. B. 446 (E. C. L. R. vol. 84).

Notice of appeal against the decision of that court in discharging the

said rule, was duly given by the plaintiff according to the 17 & 18 Viet. c. 125, s. 34.

Macnamara, for the plaintiff in error.(a)—It is *submitted, *852] that, under the circumstances stated in the case, there was a legal duty on the defendant to indemnify the plaintiff against future calls in respect of the shares in question, as alleged in the first count, a breach of which afforded the plaintiff a good ground of action. The judgment of the court below,—17 C. B. 446 (E. C. L. R. vol. 84),—proceeded entirely upon the authority of *Humble v. Langston*, 7 M. & W. 517,† 2 Railway Cases, 533. The only count in *Humble v. Langston*, was, for not indemnifying the plaintiff against calls: there was none, as here, charging the defendant with a breach of duty in not causing the transfer to be registered. A blank transfer was sent, and by the 169th section of the special act (Bristol and Exeter Railway Act, 6 W. 4, c. xxxvi.) the transfer was required to be by deed: see *Hibblewhite v. M'Morine*, 6 M. & W. 200.† Here, no deed is required; the transfer is made upon a mere request *853] *addressed to the purser, and assented to by the proposed transferee. The plaintiff in that case, as the court in giving judgment observe, “did not pursue the course which, according to law, he ought to have done.” Here, however, the vendor did all he was bound to do, to vest the shares in the vendee. [BRAMWELL, B.—There is a little inconsistency in the judgment: the court say in one part of it that the defendant never got the shares; and afterwards, that he had parted with them.] Even if that case can be upheld, it clearly is no authority for the judgment in this case, inasmuch as there the transfer was required to be by deed, and the transfer sent was void by reason of the blank left therein for the name of the transferee, and it appeared that the calls were not made until after the defendant had parted with the shares: whereas, here, no deed was required, and the defendant still held the shares. Again, the judgment in *Humble v. Langston* admits, that, if the plaintiff had done all that was incumbent on him to do, he “would

(a) The points marked for argument on the part of the plaintiff in error, were,—

“1. That, under the circumstances stated in the case, it was the duty of the defendant to indemnify the plaintiff against future calls in respect of the 500 shares, as in the first count of the declaration alleged; and that a breach of such duty is ground for an action at law:

“2. That, under the circumstances stated in the case, it was the duty of the defendant to cause the said shares to be registered in his name as owner thereof, as in the third count of the declaration alleged; and that a breach of such duty is ground for an action at law:

“3. That the blanks in the said request to transfer the shares were immaterial, as the defendant could himself have filled them up, and thereupon have been registered as the owner of the said shares:

“4. That the present case is distinguishable from that of *Humble v. Langston*, 7 M. & W. 517:

“5. That the said case of *Humble v. Langston* was erroneously decided, and ought to be overruled:

“6. That the said shares are not an interest in land, within the meaning of the statute of frauds, 29 Car. 2, a. 3, s. 4.

“7. That the said transfer or request to transfer the said shares did not require a stamp:

“8. That there is no variance between the said declaration and the evidence given on behalf of the plaintiff; and, if there is a variance, it may be amended.”

have been no longer liable to any call;" and that, "if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered their amount by way of special damage for the defendant's breach of contract." Here the plaintiff *has* done all that was incumbent on him to do: he had paid all calls due from him in respect of the shares; and, a request to the purser to transfer being equivalent to an actual transfer, the defendant might by going to him have procured himself to be duly registered,—the blank being immaterial: *Schultz v. Astley*, 2 N. C. 544 (E. C. L. R. vol. 29), 2 Scott, 815 (E. C. L. R. vol. 80), and the instances referred to in the argument in *Hibblewhite v. M'Morine*, 6 M. & W. 207.† [CROMPTON, J.—The delivery of the transfer to *the buyer with a blank in it, was an authority to him to fill it up with the name of any person he pleased as transferee. It was not intended that the property should be separated from the burthen. MARTIN, B.—Your strong argument is, that the liability arises from the sale.] Exactly so. He who takes the benefit must also bear the burthens that are incident to it. In *Burnett v. Lynch*, 5 B. & C. 589 (E. C. L. R. vol. 11), 8 D. & R. 368 (E. C. L. R. vol. 16), the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease: A. took possession, and occupied the premises under the assignment, and, before the expiration of the term, assigned to a third person: the lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee: and it was held, that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. That case has repeatedly been recognised; and by this court in *Wolveridge v. Steward*, 1 C. & M. 644, 3 M. & Scott, 561 (E. C. L. R. vol. 80). The liability of the defendant in this case rests upon the same principle which renders the holder of a bill of lading chargeable with freight; for, as is said in *Abbott on Shipping*, 8th edit. p. 42, "if a person accept anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself; and the law may very well imply a promise to perform what he has so taken upon himself,"—a dictum which is adopted by *Bosanquet, J.*, in *Lucas v. Nockells*, 1 Clarke & Fin. 457. The judgment of the Court of Queen's Bench in *Sayles v. Blane*, 14 Q. B. 205 (E. C. L. R. vol. 68), assumes that it was the duty of the transferee to cause the transfer to be registered. "The plaintiff," says *Coleridge, J.*, "being the *registered owner, was called upon to transfer to the defendant, and did so by a deed regularly executed. *It was then the duty* [*855

of the defendant to have procured that deed to be registered, which appears as well by the custom and usual course of dealing, as by the decision of Vice-Chancellor Knight Bruce, in *Wynne v. Price*, 3 De G. & S. 310." The same rule prevails in equity. Thus, in *Shaw v. Fisher*, 2 De G. & S. 11, a vendor by public auction of shares in a railway company incorporated by act of parliament, at the request of the purchaser (who had paid his purchase-money), executed a transfer to a third party, who did not accept the transfer or register himself as a shareholder: and, upon a bill filed by the vendor against the purchaser for a specific performance, the court directed the usual reference as to title. "It is difficult," said Vice-Chancellor Knight Bruce, "to assert that the defendant is to have no title, even to property of this kind; and it would probably be too much to say that the title has been accepted. I think it very likely, that, in the result, the defendant will find himself fixed with the liability to take the shares. This, however, is of course conjecture only; and the defendant is entitled to have the details of a chancery suit gone through." The case came afterwards before Vice-Chancellor Stuart on further directions,—see 1 Jurist, N. S. 971,—when that learned judge said: "The nature of the property gave to the vendor the right of compelling Fisher, the purchaser, between whom and the plaintiff, the vendor, a privity of contract subsisted, to accept a transfer such as would have made Fisher relieve the plaintiff from all liabilities arising from the change in the ownership of the property. That right is the right asserted now by the plaintiff; because, although the suit is a suit for specific performance, the whole substance and object of the suit are, that there should be asserted by a decree of this court that *856] right *on behalf of the plaintiff which should make Fisher assume the duty of relieving the plaintiff from all responsibility in respect of the shares." And the decree of Vice-Chancellor Stuart was affirmed, on appeal, by the Lord Chancellor: see 5 De G., M'N., & G. 596. The next case in equity was *Wynne v. Price*, 3 De G. & S. 310. There, a shareholder in an incorporated railway company instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B. (another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time, on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor. Upon a bill filed by the vendor, it was held, that B. was bound to execute the assignment, to procure himself to be registered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls: and a decree was made to that effect. In giving judgment, the Vice-Chancellor

(Knight Bruce) says,—“The facts of this case effectually preclude the defendant from denying privity between him and the plaintiff. The defence is without apology or excuse. The defendant must pay the calls that have been made since the sale. *He must indemnify the plaintiff against all future calls in respect of the shares*, and must take proper measures to procure himself to be registered. The manner of expressing this decree may require consideration. As to its substance there is no difficulty. There must be a reference to the master, if necessary, to inquire what calls have been made, when they were made, and *what is due in respect of them. The defendant must execute the transfer deed, and deliver it to the secretary, in conformity with the act of parliament; and the plaintiff must authorize the trustees of the company to deliver the certificates to the defendant, who must pay the costs of the suit.” *Humble v. Langston*, it is true, does not appear to have been referred to there: but *Shaw v. Fisher*, 2 De G. & S. 11, was cited, and *Humble v. Langston* was cited in *Shaw v. Fisher*; and thus *Humble v. Langston* may be said to have been before the court in *Wynne v. Price*. [CROMPTON, J.—I must confess I do not see why there should be a different rule at law and in equity.]

John Gray, for the defendant in error.(a)—*Humble v. Langston* was rightly decided, and disposes of this case. There is no implied promise on the part of the defendant either to cause the shares in question to be registered in his name, or to pay calls. The plaintiff is still the owner of the shares, and the only person who *would have a legal right to receive the profits: and, whatever right the plaintiff would have to the protection afforded by a court of equity, he has clearly no remedy in a court of law, unless by an action for not accepting the shares. [WIGHTMAN, J.—The defendant has got all that the plaintiff could give him, and may complete his title at any moment. MARTIN, B.—Suppose a man, having a lease, subject to the payment of certain rent, contracts to sell it, and the purchaser improperly refuses to accept an assignment, and the vendor is compelled to pay subsequently accruing rent,—could he not recover that from the purchaser?] Clearly not in this form of action. [MARTIN, B.—The real obligation upon the defendant is, to relieve the plaintiff from liability in respect of the shares, by getting his own name or that of a transferee inserted in the cost-

(a) The points marked for argument on the part of the defendant in error, were,—

“1. That there was no contract by or legal duty on the defendant to indemnify the plaintiff against the calls, or to register himself as the holder of the shares:

“2. That the sale or promise to transfer the shares, should have been by a written agreement, as having relation to a transfer of an interest in land; and that the paper marked C. was not sufficient, as it did not contain all the alleged terms of the contract:

“3. That no transfer of the shares is shown, but only a request to enter a transfer:

“4. That, if it amounts to a transfer, it required a stamp, by virtue of the statute 55 G. 3, c. 184:

“5. That, as the rule below was granted (amongst others) on the ground that the verdict was against evidence,—which ground was not discussed nor decided on in the court below,—the court of appeal cannot in any event give an absolute judgment in favour of the plaintiffs.”

book as the owner.] The true position of the parties is that of trustee and cestui que trust. The plaintiff clearly has no cause of action against the defendant for not registering. It is not more the purchaser's duty to register the transfer, than it is that of the vendor. The authority to the purser to register must be signed by the plaintiff. [BRAMWELL, B.—The question is, does the contract of sale involve any legal duty on the purchaser to do any more than pay the price?] It may be that there is a duty enforceable in equity. [CROMPTON, J.—How can a court of equity enforce it, unless there is a contract? Courts of equity do by a bill for a specific performance what courts of law do by an action for damages.] If the document delivered by the plaintiff to the defendant operated as a transfer, it was inadmissible for want of a 30s. stamp: 55 G. 3, c. 184, Sched. Part I., *Transfer*. [Macnamara referred to *Toll v. Lee*, 4 Exch. 230.†] Then, this is a contract for an interest in land: *Watson v. Spratley*, 10 Exch. 222.† [MARTIN, B., referred to *859] *Sparling v. Parker*, 9 Beavan, 450, where shares in a *gas-light and in a dock company, which possessed real estates for the purposes of their undertakings, were held not within the statute of mortmain.(a) The owner of shares is tenant in common with his co-owners. [MARTIN, B.—Tenant in common of what?] Of a share in the mine. [MARTIN, B.—What is a mine? There might be something in the objection if you could show a tenancy in common in the ore, minerals, earth, &c. It does not appear here that the shareholders have more than an interest in the profits derived from the working of the mine. BRAMWELL, B.—The mine may be worked under a mere license. CROMPTON, J., referred to *Humble v. Mitchell*, 11 Ad. & E. 205 (E. C. L. B. vol. 39), 3 P. & D. 141, where it was held, as was subsequently held in *Watson v. Spratley*, that shares in a joint stock banking or mining company are not "goods, wares, or merchandises," within s. 17 of the 29 Car. 2, c. 3.] The statement upon this record is descriptive of an interest in land, and of nothing else.

WIGHTMAN, J.—It appears from the whole case to have been the intention of the parties that no name should be introduced into the transfer, but that it should be left open for the defendant at his option to register the transfer in his own name or in that of any one to whom he might sell the shares. It may perhaps be worth the plaintiff's while to consider whether he will not ask leave to amend, by stating the promise to be that the defendant would cause the shares "to be registered in *860] his the defendant's name, or in that of some *other person to be named by him, as the owner thereof."

Macnamara proposed to amend, as suggested.

Gray objected that the court of error had no power to amend the record.

(a) See *Powell v. Jessup*, ante, p. 336, where it was held, that shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the 4th section of the statute of frauds, in the absence of evidence that the shareholders take a direct interest in the freehold.

WIGHTMAN, J.—Clearly we have power to amend.

CROMPTON, J.—I think it is not competent to Mr. *Gray* to object to an amendment which would have been made at the trial.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the court.

This was an appeal from the judgment of the Court of Common Pleas upon a rule to set aside a nonsuit, on the ground that, upon the facts proved at the trial, it was the duty of the defendant to have caused himself to be registered as owner of the shares in the mine, or to indemnify the plaintiff against the calls which he had been compelled to pay.

The plaintiff was the owner of five hundred shares in a mine worked by a company on what is called the cost-book principle, according to certain regulations which subjected the person registered as the owner of the shares in the cost-book to the payment of calls in respect of such shares, as long as he continued registered in the book as the owner.

The plaintiff, in pursuance of an agreement between him and the defendant, sold his shares to the latter, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested him to *enter a transfer of the shares, and all profit arising [*861 therefrom, out of his name into that of the transferee, subject to the rules under which the plaintiff held them, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement to take and accept the shares subject to the rules, with the name of the party agreeing also left in blank.

The leaving the blanks for the name of the transferee was for the benefit and convenience of the defendant, who might insert his own name or that of any other person to whom he might sell the shares; and the secretary of the company would, upon the production of the document, have registered the shares in the name of the person named in it, instead of the plaintiff.

The plaintiff, by the delivery of that document to the defendant, had done all that it was incumbent upon him to do, or that he could do, to pass the property in the shares to the defendant, who upon the receipt of it became potentially the owner of the shares, and might have made his title perfect at any time.

The defendant, however, did not cause the shares to be registered in his name: and the plaintiff was, in consequence of his name being continued on the register, obliged to pay some subsequent calls: and the question before us was, whether the defendant was under the circumstances of the case bound to cause the shares to be registered in his own name, or, if he did not, whether there was an implied contract of indemnity by him to the plaintiff.

With respect to the first point, we think that there was no obligation

on the part of the defendant to cause the shares to be registered in his name as owner. The form of the document, in which the name of the *862] proposed transferee was in blank, shows that it was *perfectly understood between the parties to the contract that the defendant should not be bound, unless he liked it, to register the shares in his own name, but that he might transfer to some other person the same right that he had: and the second point then arises, whether, if the defendant does not choose to avail himself of that power, which for his benefit and convenience is made optional with him, and not with the plaintiff, there is not an implied contract on his part to indemnify the plaintiff against the consequences of his (the defendant's) suffering the plaintiff's name to be continued on the register, after he has done all that the nature of the contract between him and the defendant, and of the property which was the subject of it, would require him to do, to convey a perfect title to the defendant.

The case of *Wynne v. Price*, 3 De Gex & Smale, 310, shows, that, in equity, the plaintiff would be entitled, under the circumstances of the present case, to be indemnified: but it was contended for the defendant that, however the case might be in equity, there was no contract for indemnity to be implied by law; and the case of *Humble v. Langston*, 7 M. & W. 517,† was relied upon as a direct authority against the plaintiff upon this point: and the Court of Common Pleas, in the judgment appealed against, considered that it was bound by that decision, though it was intimated that, but for that express decision, their own judgment might have been different.

It must be admitted that, in principle, no substantial distinction can be taken between that case and the present, except this, that, in *Humble v. Langston*, the plaintiff claimed to be indemnified by the defendant against all future calls, even though made after the defendant had himself transferred the shares to other persons: and the Court of Exchequer, at the end of the *judgment, observes that, if there were *863] any analogy in principle between the case of *Burnett v. Lynch* and that before the court, the defendant's implied promise would only be to indemnify against such calls as should be made whilst he was beneficially interested; whereas the plaintiff *Humble* claimed an indemnity against calls made after the defendant had parted with his interest. This, no doubt, is a very important distinction: and, though the Court of Exchequer expresses an opinion that there was no contract of indemnity at all, it adverts to the difference between a claim to indemnify during the time the defendant is beneficially interested, and a claim to be indemnified after he has ceased to be interested. The circumstances of the present case are therefore distinguishable from those in *Humble v. Langston*; and it consequently is not so direct an authority against the plaintiff's claim in the present case, as at first sight it might appear to be.

It seems to us that the circumstances of this case bring it directly within the principle upon which *Burnett v. Lynch*, 5 B. & C. 589 (E. C. L. R. vol. 11), 8 D. & R. 368 (E. C. L. R. vol. 16), was decided. In the present case the defendant entered into no express agreement to pay calls or to indemnify: but he accepted the only transfer the plaintiff could give, and which invested him with full power to become the registered owner of the shares whenever he pleased. That transfer expressed that the transferee took them subject to the same rules as those under which the plaintiff held them, one of which was, that the registered owner should pay the calls. It could hardly have been the intention of the parties, that, if the defendant for his own benefit omitted to make a perfect transfer by registration in the company's books, the plaintiff should still continue to pay the calls; and, if that was not their intention, was it not understood between them that the defendant *should save the plaintiff harmless from any calls made during [*864 the time when he was virtually owner of the shares? In *Burnett v. Lynch*, a lease had been granted to Burnett, in which he covenanted to pay the rent, and repair the premises: his executors assigned the lease to Lynch, subject to the performance of the covenants, but without any express covenant or contract by him that he would pay the rent or perform the covenants: the executors were called upon by the landlord, and obliged to pay damages for not repairing according to the covenant during the time Lynch was assignee: the executors brought an action on the case against Lynch, founded on a breach of duty in not repairing. In giving judgment for the plaintiffs, Abbott, C. J., says,—“It is true the defendant entered into no express covenant or contract that he would pay the rent or perform the covenants: but he accepted the assignment subject to the performance of the covenants: and we are to consider whether any action will lie against him. If we should hold that no action will lie against him, this consequence will follow, that a man having taken an estate from another, subject to the payment of rent and performance of covenants, and having thereby induced an understanding in that other that he would pay the rent and perform the covenants, will be allowed to cast that burthen upon the other person. Reason and common sense show that that never could be intended.” He then goes on to say, that, though an action on the case would lie, there might also be an action of assumpsit on an implied promise.

With the distinction of circumstances to which we have already adverted between this case and that of *Humble v. Langston*, we think that the principle upon which the case of *Burnett v. Lynch* was decided is directly applicable to the present case, and that the *plaintiff is [*865 entitled to make the rule absolute to set aside the nonsuit, and enter a verdict upon the first count of the declaration and so much of the pleas as may be applicable to that count.

Judgment accordingly.

The rule was drawn in the following form :—

“ In the Exchequer Chamber,

“ Trinity Term, in the 19th year of the reign of Victoria.

“ On an appeal from the decision of the Court of Common Pleas, in a cause of

“ Walker, Plaintiff,

“ Bartlett, Defendant,

“ Upon reading the case stated between the said parties for the decision of this court, and on hearing counsel for the appellant (the said plaintiff) and for the respondent (the said defendant), it is ordered that the nonsuit entered on the trial of the said cause, at the first sitting in Trinity Term, 1855, holden at the Guildhall in and for the city of London, be set aside, and that, instead thereof, a verdict be entered for the plaintiff on the first count of the declaration in the said cause, and also as to so much of the defendant's pleas as are applicable thereto; and for the defendant on the other counts of the said declaration.”

*866] *HANS GETHER (Plaintiff below), Appellant; MARK CAPPER (Defendant below), Respondent. *June 14.*

By a charter-party for a voyage from Sundswall (a port in the Baltic) to Southampton, it was stipulated that the owner should receive “ the highest freight which he could prove [or ‘prove by evidence’] to have been paid for ships on the same voyage or passage by water when the vessel passed Elsinore inwards, but not less than 90s. per St. Petersburg standard hundred :—Held,—affirming the judgment of the Court of Common Pleas,—that the owner could not entitle himself to a higher rate of freight than the 90s., by proving that other vessels had been chartered at such higher rate for a voyage to London; that not being, within the fair intendment of the charter-party, the same voyage.

THE following case was stated, pursuant to the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the decision of the Exchequer Chamber, by way of appeal from a judgment of the Court of Common Pleas :—

The declaration stated, that, on the 25th of June, 1853, by a certain charter-party then made between the plaintiff and certain persons therein described as Messrs. Hoare, Buxton & Co., of London, it was agreed, that, immediately after having performed the voyage from Gafle to Honfleur, the plaintiff should proceed from thence to Sundswall, and there on account of the charterers should take on board a cargo of wood, with the necessary deck-load and stowage, as much as the vessel could conveniently carry, and should then without delay proceed to Southampton, where the cargo was to be discharged according to the bill of lading, and the voyage was to conclude: And it was further agreed, that, upon delivering the same at the said place of discharge, the plaintiff was to receive *the highest freight which he could prove to have been paid for ships on the same passage by water, when the said vessel passed Elsinore*

*inwards, but not less than 90s. British sterling per St. Petersburg standard hundred, computed at 165 British cubic feet for planks, battens, and boards, and 150 cubic feet for timber, and full freight for the deck-load and for short lengths for stowage, all with 5 per cent. hat-money; which freight was to be paid to the plaintiff after a right delivery of the cargo, half in cash, and half in four months bills on London to be approved of by him: And it was further agreed that the necessary moneys for *ship's disbursements at the place of lading [*867 might be received from the shipper against insurance and in reduction of freight; and that the cargo was to be delivered free to and from the ship's side at all places, and, should lighters be required, they should be for account of the freighter; and that the freighter was to clear the cargo in all ports and rivers: Averment, that the said freighters assigned to the defendant, and the defendant then became and was the assignee of the said cargo, and entitled to receive the same; and that thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would deliver unto the defendant, as such assignee, the said cargo according to the said charter-party, the defendant then promised the plaintiff to perform and fulfil all things in the said charter-party contained on behalf of the freighters to be performed: That all times had elapsed and all things had been done by the plaintiff necessary to entitle him to the fulfilment of the said promise on the part of the defendant, and to payment according to the terms of the said charter-party: That he, the plaintiff, was able to prove, and that the fact was, that the highest freight paid for ships on the same passage by water at the time the said vessel passed *Elsinore inwards*, was, to wit, 7l. 7s. 6d. per St. Petersburg standard hundred,—of which the defendant always had notice; and that, by reason of the premises, a large sum, to wit, the sum of 800l., became due and payable to the plaintiff for the freight of the said vessel, and for per-centage thereon, and for port dues and otherwise according to the terms of the said charter-party; and that, although a certain sum, to wit, the sum of 465l. 12s. 11d., had been paid in part liquidation of the said larger sum, yet the defendant had not paid the residue, being the balance of the said freight beyond the said 90s. per St. Petersburg standard hundred, computed as aforesaid, with 5 per *cent. hat-money thereon, according to the terms of [*868 the said charter-party, and had wholly refused either to give such bills as in the said charter-party was mentioned, or to pay in cash the said freight and charges, or any part thereof.*

There was also a common count for freight, for money paid, and for money found due upon an account stated.

The defendant pleaded to the first count,—first, that it was not agreed by the said charter-party as alleged,—secondly, that the plaintiff was not able to prove, nor was it the fact, that the highest freight paid for ships on the same passage by water at the time the said vessel

passed Elsinore inwards exceeded such 90s. with such 5 per cent. hat-money. Issue thereon.

At the trial before Jervis, C. J., at the sittings in London after Michaelmas Term, 1854, a verdict was directed to be found for the plaintiff, for 807*l.*, with leave reserved to the defendant to move to enter a verdict in his favour, or for a nonsuit. A rule nisi for that purpose was obtained, which was afterwards, on the 26th of January, 1855, made absolute for entering a nonsuit: and it was against that decision that the plaintiff appealed.

The examination of the plaintiff, taken before one of the masters, was read. It was in substance as follows:—

"I am the plaintiff. I live in Laurvig, in Norway. I am captain of the vessel the *Romeriget*, and have been so for fifteen or sixteen years. I am also part-owner. The paper produced, marked A., is the charter-party on which the action is brought. *I passed Elsinore inwards on the 25th of September, 1853*, and I received the certificate marked B. from the authorities there. Before I passed Elsinore inwards, I wrote to Mr. Northcote, in London, a ship-broker. I arrived at Southampton on the 11th of December. A little before Christmas I had delivered all my cargo at Southampton. I brought my cargo from Sundswall. I received *869] the paper marked C. *before I arrived at Southampton. I think it was on the 12th of December I first saw Mr. Capper at his house at Southampton. I went to ask if it was he who was to get my cargo. Before that, his clerk had been on board. Mr. Capper replied that it was he who was to have the cargo. Mr. Vanderburgh, the Swedish consul's clerk, was with me. We then spoke about the freight. I told him I should have the highest freight I could prove was paid. He said he did not know he should pay more than 90s., as he had bought the cargo for that freight, and had not seen the charter-party. I then showed him the charter-party. He looked at it. He asked me if it was so when it was made. I said, 'Do you think I have altered it?' He said, 'I did not know there was more than 90s. to be paid.' Soon after this, I went up to London, and went to Hoare, Buxton & Co. I showed them the charter-party and the document C.(a) Hoare, Buxton & Co. gave me a letter which I delivered to Mr. Capper after Mr. Vanderburgh or his clerk had taken a copy. [This letter, dated the 14th of December, 1853, signed Hoare, Buxton & Co., was called for and produced by the defendants, marked D., Mr. Raymond objecting to its being read or used.] When I got back to Southampton, I saw Mr. Capper. I think I said, 'I suppose now, after the delivery of the letter, you will pay me the freight mentioned in Hoare, Buxton & Co.'s letter.' Mr. Capper said he would not pay more than 90s. He had nothing to do with any other ports than Southampton. I said I thought I should have the

(a) Mr. Raymond, for the defendant, objected to all questions as to what passed between the witness and Hoare, Buxton & Co.

highest freight I could prove was paid. I thought I should at least have 7*l*. Mr. Capper again said he would not pay more than 90*s*. When I returned from London, I believe some of the deck-cargo had been discharged. On *the 17th of December, I met Mr. Capper [*870 in the street. I told him I should stop delivering the cargo on account of the freight. He took me to Mr. Driver's; and he then gave me the note marked E. After receiving that note, I discharged the cargo. When the cargo was discharged, I saw Mr. Capper about settling the freight. Mr. Vanderburgh's clerk was with me. I then gave him an account of the freight. [This was called for, and not produced; the witness had no copy of it.] On this occasion, I showed him the paper marked C. I think I had shown him that paper before. Mr. Capper then offered me half money and half bills for the freight at the rate of 90*s*., and asked me to sign a receipt in full. I would not take it. The same day I went up to London. I consulted Mr. Northcote; and he gave me a paper marked F. I then returned to Southampton, and went to Mr. Capper's a few days afterwards, with Mr. Vanderburgh and Mr. Heather. One of us then delivered to him an account of freight marked G., and also showed him the paper marked P. He returned to us the paper marked G., and said he would not pay more than 90*s*. Vanderburgh asked him why. He said he had nothing to do with any other place than Southampton. Mr. Capper said he would not pay any more, and we came away."

[It was agreed that the quantities of timber delivered, and the payments made in the paper marked G., were correct; the only dispute being, whether the freight was to be charged 90*s*. or more.]

On cross-examination, the plaintiff said:—"I passed Elsinore outwards some time in November. I do not recollect the day. I cannot recollect when I first showed Mr. Capper the paper marked C., nor whether I was alone or with any other person."

The documents referred to in the plaintiff's examination marked C., D., E., F., G., were severally read at the trial; and the following are copies of them. The *defendant's counsel objected to the reading of the document marked D., on the ground that it was not admissible against the defendant. [*871

C.

"I hereby certify that I have chartered ships, within the last few days, from Sundswall, Swartwich, Hernosland, Gelfe, Soderhamn, Hudikswale, &c., to London, at the rates of 6*l*. 12*s*. 6*d*. and 6*l*. 15*s*., and 5*l*. per cent., per Petersburg Standard, with full freight for deck and stowage; and that the rates from the same ports to places in the English Channel are 7*s*. 6*d*. extra to places east of and to Southampton, and 10*s*. west of that port.

"London,

"CHARLES NORTHCOTE."

"15th September, 1858.

D.

"London, 14th December, 1853.

"Mark Capper, Esq., Southampton.

"Dear Sir,—We have just had a call from the captain of the *Romeriget*, who has presented documents proving that, under the clause in his charter-party referred to in our letter by last night's post, he is entitled to a freight for the cargo now discharging, of 7*l.* per St. Petersburg standard, and 5 per cent., which you will therefore have to pay. The captain states that you refuse to pay this freight, or to receive the cargo under such terms: and, although we presume our letter of yesterday would remove all difficulties in this respect, we think it right to mention, that, in case the ship should run on demurrage in consequence of the proceedings you are taking, we cannot under any circumstances acknowledge any liability on our part to pay or defray such demurrage.

"HOARE, BUXTON & Co."

E.

"Southampton, 17th December, 1853.

"Captain Gether, "*Romeriget*."

*872] "I engage to pay you such freight as you can legally demand by your charter-party and bill of lading, on the delivery of your cargo.

"MARK CAPPER."

F.

"My opinion with reference to the charter-party per *Romeriget*, and which is borne out by the settlement of freights in London on similar charters, is as follows:—

"The literal translation of the clause in the charter-party referring to rate of freight, is,—'The freight the captain can show is the highest paid for the same seas or water when the ship passes in Elsinore, but not less than 90*s.* British sterling,' &c.

"The ship passed Elsinore upwards the 25th September. Now, on the 21st July, I chartered the *Patriot*, *Alsar*, from Sundswall to Portsmouth at 5*l.* per same standard. On the 30th July, I chartered the *Wider*, *Hoistendable*, *Luba* to Southampton or Portsmouth, at 6*l.* Subsequently to this, I effected no charters to the Channel: but it was perfectly understood by all merchants in the timber trade, that the freights to and above Southampton are at the rate of 5*s.* to 7*s.* 6*d.*, and this year even 10*s.*, per Petersburg standard, in addition to the freight to London.

"On the 6th September, I chartered the *Sylphide*, *Sunne*, Sundswall to London, at 6*l.* 12*s.* 6*d.*; on the 7th, *Howard*, *Nelson*, *Gelfe* to London, 6*l.* 12*s.* 6*d.*; on the 8th, *Christian Agathon*, *Liebe*, *Soderhamne* to London, 6*l.* 12*s.* 6*d.*; on the 15th, *Fortuna*, *Hooland*, *Axmar*, *Gelfe* to London, 7*l.*; on the 16th, *Ivendie Brodie*, *Torkelson*, *Jettendal* to London, 7*l.*; on the 19th, *Navigator*, *Ulleness*, *Jettendal* to London, 7*l.*

The Romeriget, is, therefore, clearly entitled to at least 7l. per Petersburgh standard.

"CHARLES NORTHCOTE.

"London, 24 December, 1858."

*G.

[*878]

"Freight-note.

"Mark Capper, Esq., merchant, Southampton, the holder of the bill of lading endorsed by Messrs. Hoare, Buxton & Co.

"Dr. to Captain Hans Gether and owners of the barque Romeriget @ Sundswall.

"1858.

"Dec. 28. 1888 pieces of 9 inch 8 Do., 15278 running feet, or 2864½ cubic feet, 48 pieces 7 inch 2½ Do. battens, making 731 running feet, or 88½ cubic feet, in whole 2953½ cubic feet, at 165 cubic feet, making 17½ Pet. Standard, at 7l. 7s. 6d. per standard . . .				131	19	9
551 pieces timber, 79½ Pet. Standard, at 7l. 7s. 6d. per standard . . .				589	5	8
				721	5	0
"Five per cent. thereon . . .				36	1	2
"Dover Dues . . .				1	8	4½
"Ramsgate dues . . .				2	2	7
				760	17	1½
"By cash at Sundswall, including assurance . . . 67 8 5						
"By cash at Southampton . 100 0 0						
				167	8	5
				£598	18	8½

*"I hereby declare that the above is a true and correct account, and in accordance with freight for the same traject over the same waters at the same period, as conditioned for and set forth in the charter-party. [*874

"HANS GETHER."

Charles James Northcote, a ship-broker, and freight-agent for the Romeriget, produced a paper purporting to be a translation of the charter-party in question, and proved that he was acquainted with the Norwegian language; that the translation was not made by himself, but was correct, except in respect of the word "farvand;" (a) that such word was a Norwegian word, and meant, in the singular, "to a particular port or ports," with reference to chartering vessels, and in this case referred

(a) Which was rendered "passage by sea."

to a district of water; that it was used here in the singular, and meant "to any port within a certain district;" that it was often used in Norwegian charter-parties, and in mercantile usage was well understood; that it meant "district," "any port within a certain district." Being asked what it meant standing by itself, he said that he translated it "seas or waters,"—"any port in certain waters;" that he gave to the plaintiff the certificate marked C., and that the statements therein were true.

The witness produced and proved the following charters effected by him at the respective dates thereof:—

Sylphide, 6th September, 1853, from London to Sundswall, and back to London.

Howard, 7th September, 1853, from London to Gefle.

Christian, Agathon, 8th September, 1853, from Hull to Soderhamn, and back to London.

Fortuna, 15th September, 1853, from London to Axmar.

*875] *Ivendie Brodie, 16th September, 1853, from Hull to Jettendal, and back to London.

Navigation, 19th September, 1853, from Bristol to Jettendal, and back to London.

On cross-examination, this witness stated that none of the freights mentioned in the above charter-parties *had been paid on the 25th of September, 1853*, when the *Romeriget* passed *Elsinore* inwards; they were paid afterwards: that the clause in this charter-party stipulating for the highest freight is common in Norwegian charter-parties, but that charters are not so made in London; and that he had often, and for many years, settled freights upon it,—many in a year: that he had had nothing to do with settling freights for the last four or five years, but had attended to charter-parties: that the literal translation of the phrase in question in this charter-party, is, "the freight the captain can show is the highest paid for the same seas or waters when the ship passes *Elsinore*, but not less than 90s.:" that the word "*farvand*" means "seas or waters:" that it does not mean "voyage," either in the singular or plural: that he had settled a great many charters,—one settled with *Hoare & Co.*, at the same time, with the same words, on a voyage to London; and this was settled on the current rate of freight to London; and another at the same time to London, settled at the same rate: *that he had never settled the freight for a voyage to Southampton at the same rate as a voyage to London*, never having had any business at Southampton: that the rate of freight to Southampton is different from that to London, Hull, and Liverpool: that it is different also to Newcastle: that, to Hull, it is generally the same as to London, but not always, and sometimes rather less: that it is different to Liverpool, which is nearly twice the voyage to London: that the difference is not according to the caprice of the parties: that the freight to Southampton

*is always higher than, but regulated by, the rate to London: that it is usually 5s. higher, but at the end of 1858 he thought it was 7s. 6d. higher. [*876]

Upon the following question being put to him,—“There is no ascertained rule, like the Baltic rates?” his answer was: “No: it has nothing to do with the Baltic rates.”

He also stated, *that the exact proportion is not a matter of certainty*; but that there is usually an increase upon the difference, when the London rates are increased; that, to Southampton, it was sometimes 7s. 6d., sometimes 6s., sometimes 5s. more than London; and that, to a port further than London, they generally require a higher freight.

The following is a copy of the translation of the charter-party referred to by the last witness:—

“Charter-party or contract of freightment concluded by Jorgen Wright in Langesund, between Messrs. Hoare, Buxton, & Co., in London, on the one part, and Captain H. Gether, of Laurvig, on the other part:

“1. I, H. Gether, charter out to Messrs. Hoare, Buxton & Co., the ship under my command called Romeriget, of the burthen of 106 commercial lasts, which is to be staunch, strong, and good, well provided with good anchors, cables, sails, and other ship appurtenances, well manned, and in all respects in a perfect condition to carry merchandise across the sea.

“2. I engage to proceed, after having completed the voyage, (a) from Gefle to Honfleur, direct from thence to Sundswall, where I for account of the charterer will take on board a cargo of wood, with the requisite deck-load and stowage, as much as the ship can conveniently stow and carry, with which I will without delay sail off to Southampton, where my true place of discharge shall be, *the cargo be unloaded according to the bills of lading, and the voyage terminate. [*877]

“3. Whereas, Hoare, Buxton & Co. engage to cause to be delivered to the master, H. Gether, by Mr. N. Astrom, a cargo as above mentioned in the said ship; and, when he has truly and rightly delivered up the same at the before-mentioned place of discharge, then to pay or cause to be paid in freight, *that freight which the captain can substantiate by proof to have been highest paid on the same passage by water when the ship passes Elsinore inwards*, but not below 90s. British sterling per St. Petersburg standard hundred, computed at 165 English cubic feet of deals, battens, and boards, and 150 cubic feet of timber, with full freight for the deck-load and for short lengths for stowage, (b)

(a) This word in the original was “reise.”

(b) The passage in the original was as follows:

“3. Hoorimod Hoare, Buxton & Co. forbinde sig tib at lade levere skipper, H. Gether, ved Herr N. Astrom ed ladning som ovenmeldt, i bemeldte skib og naar han samme paa bemeldte loestede trolig og rigtgr har afleveret da at betale aller lade betale i fragt den fragt capitainen beviligen ran godtgore her hørest betalt paa samme *farrand* naar skibet indpasserer Helsin-

all with 5 per cent. hat-money; which freight is to be paid to the captain after right delivery of the cargo, one-half in cash, and one-half in a four months bill on London, to the captain's satisfaction. The necessary money for the ship's expenses at the place of loading may be obtained from the shipper against insurance, and as advance on the freight. As commission for chartering is to be paid by the ship for accounts of Mr. Jorgen Wright, of Langesund, $1\frac{1}{2}$ per cent. of the gross *878] freight and hat-money to *Mr. Alexander Gulstad in Elsinore, when the ship passes outward. It shall be permitted for the owners, if desired, to send another of their ships, of about the same size, but not more than 120 Petersburg standard, which can be expected to arrive to the same time as that named at the place of loading, to carry over the cargo of wood herein referred to.

"4. For taking in the cargo at Sundswall are stipulated eleven, and for unloading at Southampton are stipulated nine running working days, which count from the day when the ship is ready to load and to unload. Should the vessel be detained beyond that time, then is to be paid for every lay day in excess 4l. British sterling, together with the freight, &c.

"5. The cargo is to be delivered free to and from the ship's side at all places; and, should lighters or praames be required, then shall the same be for account of the charterer; whilst the master shall be bound to haul the ship to the place which the charterer shall cause to be indicated to him; but only where she can conveniently lie and float.

"6. The charterer clears the cargo, and the master the ship, in all ports and rivers.

"7. Should any average occur on this voyage, (a) the same is to be made up and settled at the place of discharge, in accordance with the sea and average laws then existing; for which, as well as for right payment of freight and demurrage according to the tenor of the charter-party, the captain has to look to the cargo and the receiver of the same, and not to the shipper, whose responsibility shall cease as soon as the cargo is on board of the ship.

"That the charter-party has thus been by us concluded, accepted, and *879] made out in duplicate, and which shall be *inviolably kept by both parties and on both sides, is hereby confirmed by the signatures at the foot of both parties, each of them retaining a copy of the same. Compensation for damages in default of compliance, is reserved. Laurvig, the 25th of June, 1858.

(Signed) "For Hoare, Buxton & Co.,

"JORGEN WRIGHT.

"For the commander of the ship,

"P. J. & P. BERG."

gøer, dog ikke under 90 sh. skriver vite skilling brit. sterling p. St. Peth. Stand hund, beregnet efter 165 engleske cubikfod af planker, battens, and bord, og 160 engleske cubikfod af planker, battens, and bord, og 160 cubfod af bjæker, samt fuld fragt for dæmslasten og for rorle længder til stænge," &c.

(a) This word in the original was "reise."

Charles Northcote, sen., also proved, on behalf of the plaintiff, that they *generally* got for freight to Southampton a certain sum in addition to the London freight; that if the London freight was 6*l.*, they should get 6*l.* 10*s.* or 6*l.* 7*s.* 6*d.*; and that there was no fixed or ascertained proportion.

Being recalled, this witness, in answer to questions put to him by the Chief Justice, and the counsel on both sides, stated in substance as follows:—There was no ascertained difference between London and Southampton; sometimes it was 7*s.* 6*d.*, sometimes 6*s.*, sometimes 5*s.* In 1858, it was rather more. If it is 6*l.* in London, it is 6*l.* 7*s.* 6*d.* at Southampton: if 6*l.* 7*s.* 6*d.*, it is 7*l.* It is not ascertained exactly: still, there is a proportion of that sort. In certain trades, such as the Baltic trade, there are known rates proportioned to the different articles. To a port further than London, we generally require a larger freight: *the proportion is matter of agreement always in each particular case*: there is no certain decided rate of difference: *it is a matter of agreement put into the charter*. If the rate of freight is high in London, of course it is greater proportionably at Southampton. It is never less than 5*s.* or 7*s.* 6*d.* above London.

On behalf of the defendant, a witness named Westin, who occasionally acts as interpreter to the Admiralty, stated that he was acquainted with the Swedish, Danish, *and Norwegian languages; and that the proper translation of the clause in question, was—"the highest [*880 freight the captain can prove by evidence to have been paid for the same voyage, when the ship enters inwards at Elsinore."

On cross-examination, he stated that the literal translation of the word "farvand," standing by itself, is, "passage by sea or water," and that he meant by "voyage," "passage by sea;" and that, in charter-parties, "farvand" means "voyage, or passage by water."

Mr. Carl Mahen, a Swede, proved that he was acquainted with the Norwegian language, and that the word "farvand" meant, "the same way by water."

Mr. William Tottie, vice-consul of Sweden and Norway, proved that he was well acquainted with the Swedish, Danish, and Norwegian languages; that the clause in question meant "the freight the captain can prove by evidence is the highest paid for the same water, the same sea, the same navigation;" that the word "farvand" is compounded of "fare," a verb, signifying "to travel," and "vand," meaning "by water;" that "farvanda" meant literally "navigation" or "sea," "passage by sea;" that, in English, he should say "similar voyage;" and that that was its meaning in the charter-party.

Upon this evidence, the Lord Chief Justice directed a verdict for the plaintiff for the amount claimed, viz., adding 7*s.* 6*d.* per St. Petersburg standard hundred to the highest freight proved to have been chartered for a voyage to London; reserving leave to the defendant to apply to

enter a verdict or a nonsuit, or to reduce the verdict by 2s. 6d. per ton: it being agreed that the court should have power to draw inferences of fact, and to amend the pleadings, if necessary.

The defendant accordingly, in Hilary term, 1855, obtained a rule nisi to enter a verdict for him, or to reduce the verdict to such a sum as the *881] court should direct; or *for a new trial on the grounds,—first, of a variance in omitting from the declaration the words “by evidence,”—secondly, that the plaintiff was not entitled to the London rate of freight, or any sum calculated with reference thereto, and that to London was not the same voyage as to Southampton.

That rule was afterwards made absolute *for entering a nonsuit*, upon the ground that the event upon which the plaintiff was to be entitled to more than the minimum freight, was clearly expressed in the charter-party, and that the plaintiff had not proved that such event had occurred; that a voyage to London, Hull, or other places, was not the same as a voyage to Southampton within the terms of the charter-party; that, no other vessel having been chartered at or received a higher freight than 90s. for a voyage to Southampton, the plaintiff was not entitled to any further sum; and that the plaintiff was not entitled to the highest freight to London, or any sum calculated with reference thereto.

The case came on for argument before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., and Martin, B.

Bovill, for the defendant, took a preliminary objection, viz. that this was not a case in which an appeal would lie, the 34th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), providing, that, “in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused, or granted and then discharged or made absolute, the party decided against may appeal,” and he the plaintiff having been allowed, by way of indulgence, to have a nonsuit entered (which the rule did not ask), in order that he *882] might go down to trial again; and *the case, consequently, being neither within the letter nor within the spirit of the enactment.

The Court, without expressing any very decided opinion, gave no effect to this objection.

Lush (with whom was *Quain*), for the plaintiff in error.—The decision of the court below is erroneous. [ALDERSON, B.—Are we to determine which is the correct translation of the Norwegian word “*farvand*?” To entitle the plaintiff to claim a higher freight than 90s., he must show that somebody has paid or contracted to pay a higher freight on the same “passage by water,” when the vessel passed *Elsinore* inwards. What is the meaning of passage by water?] The same district of waters, as rendered by Mr. Northcote,—a voyage from any channel port in England to any port in the Gulf of Bothnia. The court must interpret the charter-party according to the evidence of the meaning of its words. [BRAMWELL, B.—The meaning of a foreign word is essen-

tially a question of *fact*. Can you have an appeal upon a question of fact? ALDERSON, B.—The event has not happened on which the higher freight was to be payable.] The Court of Common Pleas construed the charter-party to mean the *same voyage*. They held that “farvand” meant a voyage from a given port to a given port, and that, as there was no evidence that any other ship had made the voyage from Sundswall to Southampton, the plaintiff had failed to make out his case. [ALDERSON, B.—I think the Court of Common Pleas decided rightly, and that we must affirm their judgment.] The evidence showed that the word “farvand” is a word well known and in common use in Norwegian charter-parties. The intention of the parties is manifest. Not knowing precisely how freights rule from Sundswall and its neighbouring ports, the owner stipulates that he shall *have the highest rate [*883 of freight which any ship making the same or a similar voyage obtains at or about the time this contract was to take effect, not necessarily confining it to a voyage from the same identical port of loading to the same identical port of discharge. The evidence on both sides shows that “farvand” is a word of wider signification and import than the court below assume. [MARTIN, B.—The “same passage by water” must mean a voyage from Sundswall to Southampton. ALDERSON, B.—Unless that is the meaning, which is to be the voyage by which the rate of freight is to be regulated?] The court must put a reasonable construction upon a mercantile contract. [MARTIN, B.—We cannot apply mercantile usage to the construction of a declaration.] Adopting the argument of the defendant’s counsel, Cresswell, J., says that the word “voyage” occurs three times in this charter-party, and that it must necessarily mean the same in each case: and he goes on to say, that, “to entitle him to a higher rate of freight for the voyage in question than 90s., the plaintiff was bound to show that some one had paid, or contracted to pay, such higher freight for ships on the same voyage when this vessel passed Elsinore. The defendant here has contracted to pay a certain sum, to be increased in a given event, which is precisely and intelligibly described: and, as that event has not happened, we cannot depart from the plain meaning of the words used, and take upon ourselves to calculate the value of a voyage from Sundswall to Southampton, by reference to the amount of freight proved to have been paid upon voyages to some other part. Adhering to the words of the charter-party, we must hold that the parties have not provided for the event which has happened. There was no other ship on the *same voyage* when this ship passed Elsinore.” This evidently proceeds upon a fallacy; for, on two of the occasions on which the word “voyage” appears in *the translation of the charter-party, viz. in the second [*884 and seventh paragraphs, its representative in the original is the word “reise,” which has a less wide signification than the word “farvand;” meaning a specific voyage from a given port to a given port.

[ALDERSON, B.—It is for the plaintiff to make out that he is entitled under this charter-party to a higher freight than 90s. per St. Petersburg standard hundred. I see nothing here to show that he is entitled to more than 90s. It would require very strong and clear proof to put upon this charter-party the construction for which you are contending.] Can the Court see any ground for holding that the parties intended to bind themselves to a voyage from and to the same identical port? [ALDERSON, B.—If they meant anything else, why did they not say so? They might have said “from any port in the Gulf of Bothnia to England.”] It is impossible to say there was not evidence for the jury. [MARTIN, B.—We can only take the facts as they are found. ALDERSON, B.—I must confess I do not think this is a case for an appeal at all. The 35th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, enacts, that, “in all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or provided the court in its discretion think fit that an appeal should be allowed: provided, that, where the application for a new trial is upon a matter of discretion only, as, on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.”] This case falls within the previous section (s. 34), which enacts, that, “in all cases of *885] rules to enter a verdict or nonsuit upon a point *reserved at the trial, if the rule to show cause be refused, or granted and then discharged or made absolute, the party decided against may appeal.” [MARTIN, B.—This was not a point ruled at all. ALDERSON, B.—Both sections refer to a ruling upon questions of law, and not upon questions of fact. BRAMWELL, B.—The court do not say that there was *no* evidence.] If necessary, the court will now allow the record to be amended. [ALDERSON, B.—To make or to refuse an amendment, is in the discretion of the court. The improper exercise of discretion is not a ground of appeal.] The decision of the court below proceeds upon the ground that there was *no* evidence to support the construction which the plaintiff put upon the charter-party.

ALDERSON, B.—We are unanimously of opinion that the judgment of the Court of Common Pleas ought to be affirmed.

Judgment affirmed, with costs.

***MYERS and Others v. WILLIS. June 18. [*886**

The register is no evidence of ownership, so as to fix the party whose name appears thereon for contracts entered into on behalf of the ship by the master.

A. advanced money to the owner of a vessel at sea, receiving from him by way of security a bill of sale of the ship, accompanied by a letter as follows:—"You have this day (August 1st, 1851) given me your acceptance for 1000*l.* against the inward freight of my barque the *Celt*, which vessel I am expecting will load home from the Pacific; and it is understood she is to be consigned to you inwards on arrival, and you are to reimburse yourself from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due repayment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me." A. registered the bill of sale on the 2d of August, 1851:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the register was per se no evidence of ownership; but that the court might look at all the circumstances, to see whether it was the intention of the parties, at the time of giving the bill of sale, that A. should become the absolute owner of the ship, so as to be liable for contracts entered into by the captain for the benefit of the ship, or whether he was to take her merely as security for his advance.

THIS was a writ of error from a judgment of the Court of Common Pleas upon a special case: see *Myers v. Willis*, 17 C. B. 77.

The particulars of the plaintiffs' demand, as set out on the record, were as follows:—

1852.

Feb. 7.	To cash advanced at Valparaiso, per charter-party	150	0	0
	Ditto Ditto	462	10	0
	To interest from 7th February, 1852, to date of payment			
	To premium of insurance on 675 <i>l.</i> at 105 <i>s.</i> per cent.	35	8	9
	Policy	1	15	0
				37 3 9

March 2.	To cash paid Messrs. Joseph Hegan & Co.'s claim for advances on cargo guano per Ferris	867	13	5
	To interest from 2d March to date of payment			

1853.

May 26.	To cash paid the difference in freight between the charters of "Celt" and "Ferris," say 10 <i>s.</i> per ton on 338 tons, 16 cwt., 3 qrs., 8 lbs.	169	8	5
	To interest from 26th May to date of payment			
Sept. 16.	To cash paid the difference in freight between the charters per "Celt" and "Apharne," say 45 <i>s.</i> per ton on 50 tons, 5 cwt., 1 qr., 19 lbs.	113	2	3
	To interest thereon until payment			

*The Court of Common Pleas having given judgment for the plaintiffs for the whole of their claim, including damages in respect of the portion of the cargo which was left at Valparaiso, as stated in the case, 17 Com. B. 85, the case now came on for argument before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., and Martin, B. [*887

Channell, Serjt. (with whom was *Tomlinson*), for the plaintiffs in error (defendants below).—The judgment of the court below, it is submitted, cannot be supported. At the time that judgment was pronounced, the case of *Mitcheson v. Oliver*, 5 Ellis & B. 419 (E. C. L. R. vol. 85),

had not been reported. It is not proposed on the present occasion to contest the principle laid down by the Court of Common Pleas in *Brodie v. Howard*, 17 Com. B. 109, and *Hackwood v. Lyall*, 17 Com. B. 124, that the mere fact of a man's being registered as a part-owner of a ship, under an absolute bill of sale, which is shown aliunde to have been given only as a security for advances, does not give his co-owner, or the master (appointed by his co-owner), authority to pledge his credit for repairs. The argument intended to be presented to the court here is perfectly consistent with those decisions. It is conceded that ownership is not the true test, and that the real question is, whether there was any contract between the parties; and that in the present case depends upon whether or not the master of the *Celt* was the agent of the defendant. But, though ownership is not the test, it is still an element in the inquiry: and here, it is submitted, there is evidence that the defendant was the legal owner of the ship. The question is, was the master the agent of the defendant at the time the order was given. In the course of the argument in the court below, the counsel for the defendant observed, "If this were the ordinary case of a purchase of a *888] ship, the purchaser would beyond all *doubt take the ship with all her liabilities, and subject to the contracts entered into by the captain for the purposes of the voyage upon which she might happen to be engaged." To which the Lord Chief Justice replies, "When a man buys a ship which is out on a trading voyage as a seeking ship, he intends to become absolute owner, and that the home freight shall be earned for his benefit; and, of course, in that case, he adopts the agency of the master. He adopts the agency, because he intends to adopt those acts which are done for his benefit. But, what pretence is there in this case for saying that the defendant intended to adopt the agency of the captain?" The negative implied there is clearly unfounded. What are the facts? The ship had sailed before the bill of sale was executed. The defendant knew that the former owner, Brandeis, was expecting her to load home from one or more ports on the west coast of America, and therefore knew that the captain had some discretionary power. Where a man takes a bill of sale of a ship which is out on a seeking voyage, intending to take the benefit of the homeward freight, he adopts the agency of the captain in all he fairly does for the benefit of the ship. [MARTIN, B.—Is not *Mitcheson v. Oliver*, 5 Ellis & B. 419 (E. C. L. R. vol. 85), conclusive of this case?] Not if the present argument is well founded. Mere ownership is not, it is conceded, the test of liability. In giving judgment in the court below, the learned judges thought themselves at liberty to infer, that, though the bill of sale appears to be absolute on the face of it, it was in fact intended as a collateral security only for the repayment of the 1000*l.* advanced, and interest. The court assume that it was only a mortgage transaction. Jervis, C. J., says: "It is admitted, that, where the party is mortgagee of the ship only, taking

merely the security of the ship, without intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and by subsequently *entering upon the possession entitling himself to the earnings of the ship, will not [*889 make the master his agent so as to bind him in respect of contracts entered into by him as master after the date of the mortgage: not because he is not entitled to the profits, as is said to be the reason in some of the older cases; but because, applying the modern doctrine of principal and agent, it never was the intention of the mortgagee, when he took the security of the vessel, to adopt the master as his agent, so as to be liable for contracts made by him." Assuming that the transaction was one of mortgage, it is submitted that makes no difference. The defendant, by the exercise of his own option in registering the bill of sale, became the absolute owner of the ship, and so adopted the agency of the master as to all acts necessarily and properly done by him in furtherance of the purposes of the voyage. [CROMPTON, J.—Is it consistent with this contract that the defendant should interfere with the captain? I think it would have excited some surprise if he had sent out instructions to the captain as to what he should do with the ship. MARTIN, B.—You are seeking to impose upon the defendant a contract which he never dreamt of. If a man takes a mortgage of an estate, could that make him responsible to the builder for a house which the mortgagor had contracted to have built for him on it?] Looking at the whole transaction, it amounts to this:—The defendant, having the ship conveyed to him by an absolute bill of sale, the consideration for which is expressed to be 1000*l.*, procures it to be registered, and has the vessel consigned to him. [CROMPTON, J.—Consigned to him, as agent, to account; not as owner.] Then, can this be treated as a mortgage at all? Is it one which a court of equity could recognise? If it be not a mortgage taken in the form required by the ship's registry acts, no interest passes of which a court of equity could take *notice. Equity will look to the title as disclosed on the register, and to that alone. In *Follett v. Delany*, [*890 2 De G. & S. 235, a bill of sale stated that the vendors of a ship executed a bill of sale to a purchaser, which was to be handed to him upon his paying the consideration in a manner stipulated, but that he took it away with some other papers, as it was supposed, by mistake, and afterwards returned it, saying he could not comply with the terms. The bill further alleged that the plaintiffs, the vendors, had discovered that the defendant, the purchaser, had taken advantage of his accidental possession of the document to make himself the registered owner of the ship, and was about to sail in her: and it was held, that the alleged fraud would not enable the court to interfere; and a demurrer to the bill was allowed. The Vice-Chancellor (Sir L. Shadwell), in giving judgment, said: "How this case would have stood if the deed had been delivered as an escrow, or if its execution had been procured by fraud, or for a

consideration not legal, it is unnecessary for me to say. It appears to me that the just inference from the record, is, that the bill of sale was executed, not as an escrow, but as a complete instrument, for a legal consideration, and under circumstances which do not render the validity of the execution questionable, although in truth there was an agreement between the parties that the deed should not be parted with,—that the defendant should not be allowed to have it until the consideration should be paid. That has not been done. The bill of sale being, according to my judgment, upon these allegations, completed as a bill of sale, it appears that the particulars of it have been entered in the proper book of registry. Then, the act of parliament(a) says that the bill of sale, *891] in such circumstances, shall be valid and effectual as to the *property thereby intended to be transferred, as against every person, to all intents and purposes, with an exception which does not apply to this case. I am most unwillingly of opinion that this is a case in which the court is bound to consider the legal and equitable title as the same.” [CROMPTON, J.—If you were to succeed in establishing here that the defendant was the legal owner of the Celt, that, under the circumstances, would in my opinion make no difference. In *Mackenzie v. Pooley*, 11 Exch. 638,† a ship sailed for a foreign port, the master having a power of attorney from the owner, and, whilst the ship was at the foreign port, the defendant purchased it; and it was held that he did not thereby become liable for necessaries supplied to the ship by order of the master. Platt, B., there says: “If the defendant had appointed the master, he would undoubtedly have been liable, since the goods were ordered by the master, and were necessary for the vessel. But the master was appointed by Woodbridge, who, whilst the vessel was on its voyage to Melbourne, sold it to the defendant. Then, what opportunity had the defendant of making any choice of the master? and how can it for one moment be presumed that the master was his agent? It is argued that the owner of a vessel is de facto liable for necessaries supplied by order of the master. There is no case in which the law is so laid down. It is true, that, in *Frost v. Oliver*, 2 Ellis & B. 311 (E. C. L. R. vol. 75), Lord Campbell expressed an opinion that legal ownership was *prima facie* evidence of liability: and so it may be, unless credit is shown to have been given to some other person. Here, the master was not the agent of the defendant.] The learned Baron goes on to distinguish *Frost v. Oliver*, “because there the defendant was the registered owner of the vessel.” Here, the defendant is the purchaser of a ship which at the time of the purchase was out on a seeking voyage: and the acts *892] *in respect of which the defendant is sought to be charged, are found by the special case to have been “such as would be binding upon the ship and such owner or owners as he had by law, under the circumstances mentioned in the case, authority to bind.” Not putting

the ownership as an absolute test of liability, it is submitted that the transaction cannot be cut down to less than a purchase. [CROMPTON, J.—Do you say that Mr. Brandeis, the original owner, would not be liable upon this contract? It is very difficult to conceive how he could be, if the present defendant is.] Both might be liable upon different grounds,—the former owner by reason of his having appointed the captain,—the defendant on the ground of his having adopted the agency of the captain.

Honyman, for the defendant in error, was stopped by the court.

ALDERSON, B.—If this had been the case of an absolute sale, it might have been doubtful under the circumstances stated. But we all agree that it was not an absolute sale, and that the judgment of the Court of Common Pleas was right, and must be affirmed, with costs.

Judgment affirmed, with costs.

The legal title in a registered ship may, consistently with the registry of the United States, exist in one person, and the equitable title in another: *Weston v. Penniman*, 1 Mason, 306. A mere mortgagee not in possession, though registered as owner, is not responsible for supplies or repairs: *M'Intyre v. Scott*, 8 Johns. 154; *Fisher v. Willing*, 8 Serg. & R. 118; *Phillips v. Ledley*, 1 Wash. C. C. Rep. 226; *Champion v. Butler*, 18 Johnson, 169; *Duff v. Bayard*, 4 Watts & Serg. 240; *Cutler v. Thurlo*, 2 App. 213; *Lord v. Ferguson*, 9 N. Hamp. 380; *Cordray v. Mordecai*, 2 Rich. 518.

*HASLETT v. BURT. June 24.

[*893

By indenture, A. demised to B. a messuage and premises for twenty-one years. The lease contained a covenant to repair, and a covenant that B., his executors, administrators, and assigns should at the determination of the term yield up the premises to the plaintiff, his executors, &c., "together with all wainscots, windows, shutters, fastenings, &c., and other things which then were or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, and improvements which should be erected, built, or made upon the demised premises, in good repair and condition."

An assignee of the lease, during the term, removed an old shop-window, and put up in its place a plate-glass front, but without in any manner fastening it (except by means of wedges) to the premises:—

Held by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that this plate-glass front was either a "window" or an "improvement" within the true meaning of the covenant, and therefore irremovable by the tenant at the end of the term, although erected for the purposes of trade.

THIS was an appeal from a decision of the Court of Common Pleas in an action for the breach of a covenant in an indenture of lease granted to one William Henry Hoggarth, and of which the defendant below (plaintiff in error) was assignee. The covenant the breach of which was complained of was in the following terms:—

"And the said W. H. Hoggarth doth hereby, for himself, his heirs,

executors, and administrators, covenant with the plaintiff, his executors, administrators, and assigns, that he the said W. H. Hoggarth, his executors, administrators, and assigns, should and would at all times during the said demise well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, and assigns, the said rent hereby reserved as the same shall become due, without any deduction or abatement thereout, for taxes, rates, or otherwise howsoever: and also shall and will once in every three years of the said term, well and sufficiently paint twice over with good and suitable oil colours, all the outside wood, and iron work of the said premises, and also the inside in like manner once in every five years of the said term; and also *from time to time and at all times during the said term*, at his and their proper costs and *894] charges, in all respects *uphold, sustain, maintain*, tile, pave, lead, *paint, purge, scour, cleanse, amend, and keep the said messuage or tenement and premises, and the said passage, tank, pump, and privy, with all the walls, *glass windows*, pipes, gutters, watercourses, sinks, drains, sewers, and appurtenances, in, by, and with all and all manner of needful and necessary reparation and amendments whatsoever; *and the same*, being so sufficiently upheld, sustained, maintained, tiled, leaded, paved, purged, scoured, cleansed, whitewashed, painted, amended, and kept, *shall and will, at the determination of the said term*, peaceably and quietly *leave, surrender, and yield up* unto the plaintiff, his executors, administrators, and assigns, *together with all* wainscots, windows, shutters, fastenings, hearths and slabs, chimney-pieces, locks, keys, bolts, bars, and other things *which now are or at any time hereafter shall be thereunto affixed or belonging* (looking-glasses and furniture excepted); *and together also with all* sheds and other erections, buildings, and *improvements which shall be erected, built, or made upon the said demised premises*, in good repair and condition."

See the declaration, ante, p. 162.

The defendant below pleaded,—first, that the estate, right, title, and interest of the said W. H. Hoggarth in and to the said house and premises and term, did not come to or vest in him, the defendant, in manner and form as in the declaration was alleged.

Secondly, that he the defendant did not break the said covenant in the declaration mentioned, nor did he suffer or permit the said messuage or tenement, or the passage, tank, pump, and privy, with all the walls, *glass windows*, pipes, gutters, watercourses, sinks, drains, sewers, and appurtenances, to be, become, or continue ruinous or in great decay for want of needful upholding, maintaining, tiling, paving, leading, painting, *895] purging, *scouring, cleansing, amending, or keeping, as in the declaration was alleged.

Thirdly, that he the defendant did not suffer or permit a certain *erection, or improvement*, to wit, a *certain plate-glass shop-front*, to be, nor was the same *pulled down* or prostrated, nor were the materials

thereof wholly carried from off the said premises, as in the declaration was alleged.

Fourthly, as to the sum of 8*l.* 10*s.* alleged to be due from the defendant to the plaintiff [for rent], the defendant brought into court the sum of 8*l.* 10*s.*, which he averred to be sufficient to satisfy the claim of the plaintiff in respect of the matter therein pleaded to.

Fifthly, *that the said plate-glass shop-front* in the declaration mentioned, *was not erected, made, or set up nor was the same standing up or affixed to the said demised premises*, as in the declaration was alleged.

The plaintiff (below) took issue on the first, second, third, and fifth pleas, and took out the 8*l.* 10*s.* in satisfaction and discharge of the claim as to which the fourth plea was pleaded.

The cause came on for trial before Jervis, C. J., at the sittings in London after Trinity Term, 1855, when an order was made, by consent, whereby it was ordered that a verdict be entered for the plaintiff for the claim in the declaration, subject to the award of a barrister, who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant, or a nonsuit entered, as he should think proper, and to whom the cause and all matters in difference between the parties were referred, and who was to state any point of law for the consideration of the court which he might be required to do,—the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator; and the arbitrator to have power to postpone his decision as to costs *of [*896 the reference and award until after the determination of the court of any point of law, and, after such determination, the award to be referred back to the arbitrator for his decision as to the said costs.

The arbitrator made his award on the 18th of November last, setting out certain facts for the opinion of the court. See the award, *antè*, p. 165.

The Court of Common Pleas held, that, whether an "improvement" within the meaning of the covenant or not, the plate-glass shop-front was at all events a "window" belonging to the demised premises, and therefore that the removal of it by the assignee was a breach of covenant.

Upon this judgment, the defendant below brought error, pursuant to the provisions of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 82.

The case was argued on the 18th instant, before Alderson, B., Coleridge, J., Wightman, J., Erle, J., Crompton, J., and Martin, B.

Hawkins (with whom was *Joyce*), for the plaintiff in error.—The breach alleged in the declaration, is, that, after the assignment, and during the term, the defendant suffered and permitted a certain erection and improvement, to wit, a certain plate-glass shop-front (not being looking-glasses or furniture), which, during the term, had been erected,

made, and set up, and was standing up and affixed to the demised premises, to be, and the same was, pulled down and prostrated, and the materials thereof wholly removed from off the said premises, and not left, surrendered, or yielded up unto the plaintiff at the determination of the term, contrafy to the form and effect of the said indenture, and the covenants therein contained in that behalf. The finding of the arbitrator, that this plate-glass front was not a fixture, is upon the fifth issue.

*897] [COLERIDGE, J.—Whether a “window” or not, was *immaterial upon these pleadings. The third issue is found for the plaintiff.]

The court below held it to be a “window.” That clearly is a mistake.

[BRAMWELL, B.—Have we anything to consider but the finding of the arbitrator? He seems to have wholly disregarded the pleadings.] Is this a window? [BRAMWELL, B.—What else is it?] A plate-glass shop-front. It is not fixed to the demised premises. [WIGHTMAN, J.—How

is a window which slides up and down ordinarily fixed? ALDERSON, B.—I cannot conceive this to be other than a window. If not fixed to the premises, it clearly was belonging to them.] It is perfectly clear from the manner of placing it that it never was intended to belong to the premises. It was temporarily put up for the convenience of the defendant's trade. [MARTIN, B.—What more apt language could have been used, if it had been intended that this plate-glass front should pass to the landlord? ERLE, J.—It is an important question. These ornamental shop-fronts are frequently put in, and have usually been considered as chattels belonging to the tenant. WIGHTMAN, J.—The question depends upon the particular words of the covenant.] It clearly was not an erection or improvement within the fair meaning of the covenant. In *Elliott v. Bishop*, 11 Exch. 170,† C., by indenture, demised to E. an unfinished messuage, for the term of ninety-seven years. The indenture contained a covenant by E., that, at the expiration of the term, he would deliver up the demised premises unto C., “together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other

fixtures and articles in the nature of fixtures, which should at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging.” E. took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern-keeper and licensed victualler, and for that purpose

*898] put in the premises certain *fixtures of the description called and known as trade and tenant's fixtures. B. afterwards contracted with E. to purchase from him an underlease of the premises, and the good-will, and also the furniture, fixtures, stock in trade, &c., at a valuation. In pursuance of this contract, E. executed to B. an underlease, which contained a covenant on the part of the defendant in the same words as the above covenant by E. in his lease: and it was held, on error, that the covenant above set forth did not restrain B., the lessee, from disposing either of the tenant's or the trade fixtures,—thus limiting

the general words of the covenant to fixtures of the same kind and description that had been before enumerated. The covenant there was quite as strong as here. [MARTIN, B.—I think that case a very *strong* one. WIGHTMAN, J.—Both parties call this a “shop-front,” not a window.] Suppose, instead of a mere front of plate-glass, it had been a glass-case or box for the display of goods, merely placed in the aperture as this was, would the defendant have been bound to leave it? [BRAMWELL, B.—Suppose the tenant had, during the term, sometimes the plate-glass front and sometimes the old window in, which would he be bound to leave on the premises at the end of the term?] Not both, certainly. Suppose the shop-front required renewing several times during the term, what would be the extent of the tenant’s liability, according to the decision of the court below? [ERLE, J.—If the sheriff had come in during the term with a *fi. fa.* against the tenant, I know no reason why he should not seize this plate-glass front.] A “fixture” it cannot be: nor is it an “improvement,” within the meaning of the covenant; for, that refers to improvements *ejusdem generis* with those before specified, *viz.*, “sheds, erections, and buildings.”

R. E. Turner (with whom was *Hayes*, Serjt.), for the defendant in error.—This plate-glass front was an “improvement” within the meaning of the covenant and the third issue. [COLERIDGE, J.—[*899 Assume it to be an “improvement,” how is it material to the fifth issue?] It was erected, made, or set up, and affixed to the premises during the term. It was for years used as the window of the shop. In *West v. Blakeway*, 2 M. & G. 729, 3 Scott, N. R. 218, a lessee covenanted, as here, to yield up in repair at the expiration of his term, all *erections and improvements* which should be erected, made, or set up during the term upon the demised premises: an assignee having during the term erected a greenhouse, the frame-work of which was no otherwise fixed to the walls thereof than by being laid thereon, embedded in mortar,—it was held, that the removal of the sashes and frame-work was a breach of the lessee’s covenant, though no damage was done to the premises, and the walls and flues were left in a perfect state. Tindal, C. J., there says: “I thought at the time, that the parties had adopted the words ‘erections and improvements’ for the very purpose of avoiding all discussion as to what might be considered as coming within the description of a fixture, which is the term generally used in covenants.” [COLERIDGE, J.—There, the greenhouse clearly was an erection; and the tenant took away part of the erection.] In *Hellawell v. Eastwood*, 6 Exch. 293,† machinery for the purposes of manufacture,—*ex. gr.* “mules” used for spinning cotton,—fixed, by means of screws, some into the wooden floors of a cotton-mill, and some by being sunk into the stone flooring, and secured by molten lead, were held to be distrainable for rent.(a) Parke, B., there says: “Things fixed to the freehold, and which

(a) See *Wilde v. Waters*, 16 Com. B. 637.

become part of it, could not be distrained, for two reasons. Lord Chief Baron Gilbert says, that, whatever is part of the freehold cannot be distrained; for, what is part of the *freehold cannot be severed *900] from it without detriment to the thing itself in the removal; consequently, that cannot be a pledge, which cannot be restored in statu quo to the owner. Besides, what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the inducta et illata upon the soil or house; and, on the sole ground that they were parcel of the freehold *by construction of law*, keys, windows, and charters concerning the realty, were not liable to be distrained." [WIGHTMAN, J.—The two branches of the covenant are oddly enough mixed up in the pleadings and in the award. In the declaration, the thing removed is described as "a certain erection and improvement, to wit, a certain plate-glass shop-front (not being looking-glasses or furniture), which, during the term, had been erected, made, and set up, and was standing up and affixed to the demised premises." And then the fifth plea is, "that the said plate-glass shop-front in the declaration mentioned, was not erected, made, or set up, nor was the same standing up or affixed to the said demised premises as in the declaration alleged." Which of these descriptions does the thing in question come within?] It is an "erection or improvement" set up during the term. [BRAMWELL, B.—The question is, whether this shop-front is ejusdem generis with "fixtures, fastenings, and improvements."] The court will put a reasonable construction upon the finding of the arbitrator, coupled with the description in the pleadings. [WIGHTMAN, J.—It is not easy to see what it is that we are called upon to decide.]

Hawkins, in reply, was stopped by the court. *Cur. adv. vult.*

MARTIN, B., now delivered the judgment of the court:—

*901] *This was an action upon a covenant in an indenture dated the 1st of May, 1841, whereby certain premises in Woolwich were demised to one Hoggarth for twenty-one years, the covenant in question being "that Hoggarth, his executors, administrators, and assigns, should uphold, sustain, maintain, tile, lead, pave, paint, purge, scour, cleanse, amend, and keep the said messuage or tenement and premises, and the said passage, tank, pumps, and privy, with all the walls, *glass windows*, pipes, gutters, watercourses, sinks, drains, sewers, and appurtenances, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever; and the same, being so sufficiently upheld, sustained, and maintained, tiled, leaded, paved, purged, scoured, cleansed, whitewashed, painted, amended, and kept, should and would, at the determination of the said term, peaceably and quietly leave, surrender, and yield up unto the plaintiff, his executors, administrators, or assigns, together with all wainscots, *windows*, shutters, fastenings, hearths and slabs, chimney-pieces, locks, keys, bolts, bars, and other things which

then were, or at any time thereafter should be, thereunto affixed or belonging (looking-glasses and furniture excepted), *and together also with all sheds and other erections, buildings, and improvements which should be erected, built, or made upon the said demised premises*, in good repair and condition."

An action was brought on an alleged breach of that covenant; and the facts proved before an arbitrator, and found by him, were, that a plate-glass shop-front had been erected by the defendant, the assignee, for the purpose of making the shop more convenient for his trade; and the arbitrator in his award stated at length in what manner that shop-front was erected. It was not fixed to the premises by screws, or nails, or bolts; but by *wedges only. And it was contended on the part of the defendant below, that, at the expiration of the term, [*902 according to the true construction of the covenant above set forth, he had a right to remove that plate-glass shop-front, and to replace the old window, as it had existed at the time of the demise. The case was argued before the Court of Common Pleas; and they were of opinion that the tenant had not that right: and in that opinion we concur.

We think, that, if this plate-glass front was not a "window," it was at all events an "improvement" within the true meaning of the covenant; and that the lessee by his bargain contained in the lease bound himself and his assigns to leave such an erection upon the premises, if he or they thought fit to set it up during the term.

A question arose upon the pleadings, as to the mode in which the question was presented to the court by the arbitrator, or, rather, as to what he found. "If," he says, "the court should be of opinion, on the facts above stated, that the said plate-glass front or window was set up or affixed to the said demised premises, and that the defendant was not entitled to remove it, then I find the issue taken on the *last* plea in favour of the plaintiff." Some little doubt was expressed by one of the members of the court, whether that was a proper finding on the issue. But, upon consideration, we think that we have nothing to do with that. We have to decide on that which was submitted for the opinion of the Court of Common Pleas; and, as we are of opinion that this plate-glass front or window was set up and was affixed so as to make it irremovable by virtue of that covenant, we are of opinion that the judgment on the last plea should be for the plaintiff, and we accordingly affirm the judgment of the Court of Common Pleas.

*ALDERSON, B.—It clearly is a window or an improvement.

Turner, for the defendant in error, asked for the costs of [*903
affirmance.

MARTIN, B.—This is an appeal from a judgment of the Court of Common Pleas, which we think correct; consequently the plaintiff in error must pay the costs. Judgment affirmed, with costs.

BAGSHAW v. SEYMOUR. *June 13.*

THIS was a bill of exceptions to the ruling of Lord Chief Justice Jervis, in an action brought against the defendant, the chairman of the directors of a company called The Lake Bathurst Australasian Gold Mining Company, for a false and fraudulent representation made by the defendant and others to the committee of the Stock Exchange, in order to induce the committee to appoint a settling-day for shares in the company, and to permit the same to be inserted in the official share-list of the Stock Exchange, whereby the plaintiff was induced to purchase shares in the company, which were of no value.

By consent of counsel, for the purpose of going at once to the House of Lords, judgment of affirmance was pronounced, without hearing.

22 C. L. 91.

Judgment affirmed.

*904]

*BAGSHAW v. LANE. *June 13.*

THIS also was a bill of exceptions to the ruling of the same learned judge in an action against one of the managing directors of the company for the like fraudulent representations.

By consent of counsel in this case also judgment of affirmance was taken, without hearing.

Judgment affirmed.

END OF TRINITY VACATION.

*905]

*MEMORANDUM.

The reporter has frequently been asked for, and reproached for not having published, a note of a case of *Gillett v. Offor and Gamman* (which was argued in Easter Term, 1855), under an impression that it decided a point left untouched by any of the previous authorities upon the subject. He has, therefore, thought it right at the end of this volume,—although the case was compromised whilst the judgment was under the consideration of the court,—to give a statement of the facts, and an outline of the argument and the authorities referred to.

GILLETT v. OFFOR and GAMMAN.

THE plaintiff, a shipowner, sought by this action to recover from the defendants, who are ship and insurance brokers, 271*l.* 11*s.* 3*d.*, being one-half the freight earned by the plaintiff's ship "Peace" on a voyage performed under the following charter-party:—

"London, 16th April, 1854.

"It is this day mutually agreed between Mr. William Gillett, of the

good British ship or vessel called the *Peace*, registered in veritas as of the measurement of 330 tons, or thereabouts, now on her voyage to Venice, and Messrs. Offor & Gamman, of London, *agents for charterers and merchants*, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Cadiz, or so near thereunto as she may safely get, and there load from the factors of the said affreighters a full and complete cargo of salt; the cargo to be brought to and taken from alongside the vessel at *merchants' risk* *and expense, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, [*906 provisions, and furniture; and, being so loaded, shall therewith proceed to Halifax, or so near thereunto as she may safely get, and deliver the same on being paid freight as follows,—say, 27s. 6d. per ton of 20 cwt., in full of all port-charges and pilotage (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted). The freight to be paid on unloading and right delivery of the cargo, one-half in cash at the port of discharge, and *the remainder by captain's bill on the merchants, at sixty days' sight*. Thirty running days are to be allowed *the said merchants* (if the ship is not sooner despatched) for loading the ship at Cadiz, and discharging, and ten days on demurrage over and above the said laying days at 6l. per day. Penalty for non-performance of this agreement, 450l. The captain to sign bills of lading, if required, at any rate, without prejudice to this charter. The ship to be addressed to *charterers' agents, free of commission*.

“for W. Gillett, managing owner,

“HOOPER & BAKER, agents.

“OFFOR & GAMMAN, agents.”

In the margin was the following memorandum:—

“The brokerage is 5 per cent. by the ship, on account of freight, primage, and demurrage, and is due to Hooper & Baker on the signment of this agreement. The ship to be reported at the Custom House, London, by Hooper & Baker, 12 Eastcheap, or by their agents at the port of discharge.”

The declaration alleged the charter-party to have been made between the plaintiff as owner, and the defendants as affreighters, and assigned for breach the non-payment of the second moiety of the freight. The *defendants pleaded that it was not agreed as in the declaration [*907 alleged.

The cause was tried before Jervis, C. J., at the sittings in London, after Hilary Term, 1855. The facts which appeared in evidence were as follows:—The vessel duly loaded at Cadiz, and proceeded to Halifax, where she discharged her cargo. One-half of the freight was there paid in cash by Messrs. Tobin & Co., of that place, the consignees; and, on

the 18th of October, 1854, the master drew a bill for 271*l.* 11*s.* 3*d.*, the other half of the freight, at sixty days' sight, upon Messrs. P. O'Rorke & Co., of Sligo, for whom the defendants acted as agents in procuring the charter-party.

On the part of the plaintiff, it was submitted, that reference must be had to the contract, and to the contract alone, to see who were the parties charged by it; and that it was not competent to the defendants to show by parol that they made it, not as principals and on their own behalf, but for a principal whose name did not appear therein.

There was some controversy as to whether or not the names of the principals had been disclosed at the time the charter-party was entered into; but the jury found that they had.

A further question submitted to the jury,—suggested by a reference to *Thomson v. Davenport*, 9 B. & C. 78, 4 M. & R. 110,—was, whether, *the principals being foreigners*, the credit was given to the agents or to the principals. That question also the jury answered in favour of the defendants.

His lordship thereupon directed a verdict to be entered for the defendants; reserving leave to the plaintiff to move to enter a verdict for him, if the court should be of opinion that the defendants were personally liable.

*908] *Knowles*, on the 18th of April, 1855, accordingly *obtained a rule calling upon the defendants to show cause why a verdict should not be entered for the plaintiff for 271*l.* 11*s.* 3*d.*, or why there should not be a new trial “on the grounds, that, by the contract, the defendants were personally liable; that, the principals not being disclosed by the charter, parol evidence was inadmissible to show they *were* disclosed; and that, the principals being foreigners, the agents making the contract were liable.” [CRESSWELL, J.—The defendants do not describe themselves as acting “as agents,” either in the body of the charter-party or in the signature.] They do not. But, assuming that that makes no difference, the case comes distinctly within the rule laid down in *Thomson v. Davenport*, as stated in the notes to that case in 2 Smith's Leading Cases, 4th edit. 286, 298, where, speaking of a dictum of Lord Holt in *Ashton v. Sherman*, Cases temp. Holt, 308, it is said,—“From this case, added to those in the text, we may infer,—1. That where A. contracts with B., without stating himself to be an agent, B. may, on discovering his principal, elect between them: see *Franklyn v. Lamond*, 4 Com. B. 637, and *Peterson v. Ayre*, 13 Com. B. 353. 2. That the rule is the same where he states himself to be an agent, but does not name his principal.” And, in a subsequent part of the same note,—p. 303,—it is said: “That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of

entering into it, seems to be now well established. The cases of *Lead-bitter v. Farrow*, 5 M. & S. 345, *Lefevre v. Lloyd*, 5 Taunt. 749, *Sowerby v. Butcher*, 1 C. & M. 371,† 4 Tyrwh. 820, show that an agent drawing, accepting, or endorsing negotiable securities in his own name, is personally liable upon them to the holder. In *Magee v. *Atkinson*, 2 M. & W. 440,† on the trial of an action of assumpsit for [*909 the non-delivery of railway shares, it appeared that the defendant, who was a share-broker, sold the shares in question, on account of Mr. Jacob, to one Scholes, the plaintiff's agent; he then returned home, and informed his clerk that he had sold the shares to Scholes, on which the clerk entered in the book a sale from the defendant to Scholes, and a contract note to the same effect was sent to Scholes. The defendant shortly afterwards altered the book, by inserting Jacob's name as the seller, and sent another note to Scholes, in which Jacob appeared as seller. On these facts, Patteson, J., left it to the jury to say whether the second note was a correction of a mistake in the first; and he told them that, 'if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as a broker merely; and, though known to be an agent, if the defendant signed the contract in his own name, he was liable.' Evidence was tendered to show a custom to send in brokers' notes without disclosing the principal's name, but this evidence was rejected. The jury found a verdict for the plaintiff, and the Court of Exchequer approved of the direction of the learned judge, and refused a rule for a new trial. 'I do not see,' said Parke, B., 'any default in the rejection of the evidence, because the evidence tendered was to alter the written contract.' 'The custom offered to be proved,' said Alderson, B., 'was a custom to violate the common law of England.''' In *Higgins v. Senior*, 8 M. & W. 834,† in an action on a written agreement purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods of the value of 10*l.*, it was held not to be competent for the defendant to discharge himself, on an issue on a plea of non assumpsit, by proving that the agreement was really made by him by the *authority of and as [*910 agent for a third person; and that the plaintiff knew those facts at the time the agreement was made and signed. *Jones v. Little-
dale*, 6 Ad. & E. 486, 1 N. & P. 677, is exactly to the same effect. The present case, however, differs from all that appear in the books, inasmuch as here the parties *describe themselves* as agents. Further, it is submitted, upon the authority of *Thomson v. Davenport*, that, the principal here being a foreigner,—resident in Ireland,—the credit must be assumed to have been given to the agents in this country. [CRESSWELL, J.—The question is, with whom was the contract made?] *Humble v. Hunter*, 12 Q. B. 310 (E. C. L. R. vol. 64), was also referred to. [CRESSWELL, J., referred to *Rayner v. Grote*, 15 M. & W. 359.†]

Byles, Serjt., and *T. Jones*, showed cause on the 28th of April.—In VOL. XVIII.—38

the body of the charter-party, the defendants are called "agents for charterers and merchants;" the vessel is to load "from the factors of the said affreighters," at Cadiz, a cargo of salt, which is to be brought to and taken from alongside "at merchants' risk;" the freight is to be paid, one-half in cash on delivery of the cargo at the port of discharge, the remainder "by captain's bill on the merchants;" the ship is to be addressed to "charterers' agents;" and the signature is, "Offor & Gamman, agents." It is now sought to charge the defendants personally, on the ground that they merely *describe* themselves as agents, without stating expressly that they contract *as* agents, or mentioning the names of their principals. This rule admits of four distinct answers. 1. That the charter-party does sufficiently refer to the principals. 2. That the nature and scope of the instrument shows that the principals are to be looked to for payment, and not the agents. 3. That there is no decided case to show that a party signing a contract as this is signed is charge-
 *911] able as principal. 4. That parol *evidence is admissible to show who were the contracting parties.

1. The charter-party does not in terms *name* the principals; but it sufficiently refers to them. The last of Bacon's maxims (reg. 25) applies to this case,—"*Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.*" The defendants describe themselves as "agents for charterers and merchants." The merchant means the owner of the cargo to be put on board. [CRESSWELL, J.—There is no specific cargo: all is uncertain.] *Id certum est quod certum reddi potest.* [CRESSWELL, J.—Would the description apply to any one at Cadiz who might put a cargo on board? It clearly does not at the time it is executed designate who the merchants are.] They are intimated by a circumstance; not then pointed out certainly. [CRESSWELL, J.—Nor ascertained at the time.] The principals are sufficiently pointed out by the circumstances, as the owner of a particular cargo.

2. The charter-party expressly provides that the "merchants" are to pay the stipulated freight. [JERVIS, C. J.—It does not follow that the merchant is the charterer, because the merchant is to pay the freight. CRESSWELL, J.—It may be that Offor & Gamman contract that the merchants shall accept a bill, for the freight; and they may be liable if they refuse to accept.] The defendants were mere brokers. [CRESSWELL, J.—We do not know that.] In *Carr v. Jackson*, 7 Exch. 382,† a charter-party contained the following clause,—"*This charter-party being concluded by C. T. Jackson (the defendant) on behalf of another party resident abroad, it is agreed that all liability of the former ceases as soon as he has shipped the cargo:*" it was shown that the defendant had paid for the goods in his own name, and that, at the port of destination, they had been claimed by and delivered to a person who produced an unsigned bill *of lading which the captain had delivered
 *912] to the defendant: and it was held, that there was no evidence

that the defendant acted as principal, so as to render him liable for the freight.^(a) [CRESSWELL, J.—The difference of the two signatures to this charter-party is curious.] Looking at the description of the defendants at the beginning, at the stipulation for payment, and at the signature at the end, it amply appears that the defendants were known to be contracting as agents only: *Downman v. Williams*, 7 Q. B. 108; *Lewis v. Nicholson*, 18 Q. B. 503. *Lewis v. Nicholson* was an action of assumpsit on a promise, that, if the assignees of a bankrupt would permit the sale of his goods, the defendant would pay the plaintiff the net proceeds to the amount of his debt secured on such goods. The defendant pleaded non assumpsit; and on the trial it was proved that the defendants, being solicitors to the assignees, wrote to the plaintiff's solicitor, saying,—“In consideration of” plaintiff's “consenting to the sale,” “we hereby, *on behalf of the assignees*, consent that the net proceeds” shall be paid to the plaintiff. This offer was accepted: the goods were sold; but the proceeds were not paid over. The letter was written by the authority of the trade assignee, but not known to nor ratified by the official assignee. Other subsequent letters were in evidence. The plaintiff was nonsuited: and, upon a motion to set aside the nonsuit, it was held, that, on the true construction of the letter, the defendants did not contract themselves, but made the contract for the assignees: that the trade assignee had no authority to bind the official assignee personally; but that this absence of authority did not make the defendants liable on the contract as principals. Lord Campbell says,—“The letter expresses, that, in consideration of the plaintiff consenting to the sale, ‘we *hereby *on behalf of the assignees*, con- [913 sent.’ My Brother Shée in effect asks us to read the contract as if the words *on behalf of the assignees* were not there: but they are there; and the nature of the facts shows that they were meant to express a contract by the assignees; for, it was the consent of the assignees to pay over the money, that was material to the plaintiff.” That is, in substance, what the court is asked to strike out here. That case furnishes a rule of decision which may be reasonably acted upon in this case. It is manifest that the merchants were looked to for payment, and not the agents. [WILLIAMS, J.—It seems to be assumed that the plaintiff knew who the “merchants” were.] The jury so found. [CRESSWELL, J.—Do you contend, that, if the defendants had at the commencement of the charter-party described themselves as “agents of Messrs. O'Rorke & Co.,” and then signed it in the manner they have done, they would, upon the authorities, not be liable personally?] It is submitted that they would not. The court would look at all the circumstances. The argument assumes that the names of O'Rorke & Co. are inserted.

3. In some of the text-books, it is broadly laid down that one who contracts as agent for an undisclosed principal, is personally responsible.

(a) See *Bickerton v. Burrell*, 5 M. & Selw. 383.

Thus, in Story on Agency, § 266, it is said, that "a person contracting as agent will be personally responsible where, at the time of making the contract, he does not disclose the fact of his agency, but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly that credit is given to him on account of the contract. Thus, a factor or broker, or other agent buying goods in his own name for his principal, will be responsible to the seller therefor in every case where his agency is not disclosed." Again, § 267, he says,—"*The same principle will apply to contracts made by agents, where they are* *914] **known to be agents, and acting in that character, but the name of their principal is not disclosed*; for, until such disclosure, it is impossible to suppose that the other contracting party is willing to enter into a contract exonerating the agent, and trusting to an unknown principal, who may be insolvent, or incapable of binding himself." The learned author refers to Smith's Commercial Law, Section VII., p. 169 (5th edit.) In *Hanson v. Roberdeau*, Peake's N. P. C. 120, Lord Kenyon ruled, that, where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damages for not completing the contract: but that is not sustained by any subsequent authority. No doubt, if the principal be not disclosed at the time of entering into the contract, the agent is liable: *Higgins v. Senior*, 8 M. & W. 834.†

4. Where the party making the contract describes himself as agent for another, it is competent to him to show by parol evidence that he disclosed his principal at the time, not for the purpose of contradicting the written contract, but, as Cresswell says, arguendo, in *Higgins v. Senior*, "to point the agreement to the true party who made it by his agent." [CRESWELL, J.—In the notes to *Thomson v. Davenport*, in Smith's Leading Cases, it is said to be now fully established "that parol evidence can never be admitted for the purpose of *exonerating* an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into it." If this contract makes Messrs. Offor & Gamman the contracting parties, I apprehend they cannot get rid of their liability, by showing by parol evidence that at the time they entered into it they stated that they did so as agents for O'Rorke & Co. If you introduce parol evidence to show that they did *915] not *contract as they purport to contract, do you not contradict the document?]

The third ground upon which the rule was obtained, may be disposed of in a word. The suggestion of Lord Tenterden in *Thomson v. Davenport*, 9 B. & C. 78, 4 M. & R. 110, that, where the principal is a foreigner, the law casts a liability upon the agent, although the principal was expressly named at the time, is clearly not law. It was repudiated by this court in *Peterson v. Ayre*, 13 C. B. 353 (E. C. L. R.

vol. 76), and *Mahony v. Kekulé*, 14 C. B. 390 (E. C. L. R. vol. 78); and still more pointedly in the recent case of *Green v. Kopke*, *antè*, p. 549. [JERVIS, C. J.—The rule,—if there be any such,—clearly does not apply to a case of this sort.]

Knowles and Willes, in support of the rule.—The defendants in this case have contracted in such a manner as to make themselves personally liable. They have not on the face of the contract disclosed the names of their principals, or so pointed them out as to leave no doubt as to the party meant to be charged. What is the contract? It begins,—“It is this day mutually agreed between Mr. W. Gillett and Messrs. Offor & Gamman, agents for charterers and merchants,”—not “*as agents*,” which is an important omission, for the expression used imports no more than a mere description of their trade,—as if it had been “ship-brokers” or “commission-agents.” The ship is to proceed to Cadiz, and there load a full cargo “from the factors of the *said affreighters*.” She is then to proceed to Halifax, and deliver the cargo, on payment of freight, one half in cash, the residue by captain’s bill on the merchants, at sixty days’ sight. And it is signed “for W. Gillett, Hooper & Baker, agents; Offor & Gamman, agents.” Who is to be the charterer? Who is to put the goods on *board? Who is to pay the freight? The charter-party is wholly silent as to all these matters. The in- [*916]ference, therefore, is, that the parties making the contract are liable: and the question is, whether resort can be had to parol evidence to show that some persons not named therein, nor designated therein by reference, are the contracting parties. The case of *Carr v. Jackson*, 7 Exch. 382,† is disposed of by the observation made by Cresswell, J. If the defendants had expressly contracted *as agents* for O’Rorke & Co., and had signed the charter-party *as agents*, the case might have admitted of a very different consideration. But here, no principal is named, or designated by any description that can with certainty be applied to any one. The rule, as deduced from a careful review of the authorities, clearly is, that, where a man contracts, though he states himself to be an agent at the time, if he does not name his principal, he is himself personally liable. This is expressly laid down in *Magee v. Atkinson*, 2 M. & W. 440;† and still more clearly in *Jones v. Little-dale*, 6 Ad. & E. 486 (E. C. L. R. vol. 33), 1 N. & P. 677 (E. C. L. R. vol. 36), where Lord Denman says: “There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear, that, if the agent contracts in such a form as to make him personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.” But the case which decisively fixes the rule, is *Higgins v. Senior*, 8 M. & W. 834.† If there be any case which more especially requires the exclusion of parol

evidence to vary the terms of the written contract, it is this case. In *Wilson v. Zulueta*, 14 Q. B. 405 (E. C. L. R. vol. 68), where the defendant expressly contracted in writing "*in behalf and representation*" of *Don *Antonio Parego of Havana*," but some of the matters *917] provided for by the agreement were to be done in England, the court, held, on the construction of the agreement, that the agent was personally liable on it. (a) In *Kennedy v. Gouveia*, 3 D. & R. 508 (E. C. L. R. vol. 16), the consignee and agent of a vessel chartered for a specific voyage, entered into an agreement with the captain, describing himself as "*consignee and agent*" of the above brig and cargo, "*on behalf of Mr. M.*, merchant of Liverpool," the agreement stating that "it is witnessed that the said parties agree" that the vessel shall go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party, and then signed the agreement in his own name, without describing himself as agent: and it was held, that he made himself personally liable for the freight of the homeward voyage. That is a much stronger case than this; for here there are no qualifying words at all. And see *Tanner v. Christian*, 4 Ellis & B. 591 (E. C. L. R. vol. 82).

The circumstance of the principal being a foreigner is observed upon by Maule, J., in delivering the judgment of the court in *Smyth v. Anderson*, 7 C. B. 21 (E. C. L. R. vol. 62). And, even according to the recent authorities in this court, it is a fact that is not to be lost sight of. In *Story on Agency*, 4th edit. § 268, it is assumed to be a general rule, "that agents or factors acting for merchants resident in a foreign country, are held personally liable upon all contracts made by them for their principals; and this without any distinction whether they describe themselves in the contract as agents or not. In such cases, the ordinary *918] presumption is, that credit is *given to the agents or factors; and, not only that credit is given to the agents or factors, but that it is exclusively given to them, to the exoneration of their employers." (b)

(a) But see *Mahony v. Kekulé*, 14 C. B. 390.

(b) This is controverted in 2 Kent's Commentaries, 630. See the passage cited by Jervis, C. J., in *Green v. Kopke*, ante, pp. 554, 555.

The American authorities seem to favour the position that as between the original parties to a contract, not under seal, it is competent to show that the defendants executed it as agents, provided it was at the time declared or known to the plaintiff: *Brockway v. Allen*, 17 Wend. 40; *Webb v. Burke*, 5 B. Monroe, 51; *Hovey v. Magill*, 2 Conn. 680. See *Hills v. Bannister*, 8 Cowen, 31; *Fogg v. Virgin*, 19 Maine, 352; *Pomeroy v. Slack*, 16 Verm. 220; *Packard v. Nye*, 2 Metc. 47; *Fitch v. Lawton*, 6 How. (Miss.) 371; *Rupert v. Madden*, 1 Chandler, 146; *Collins v. Johnson*, 16 Georgia, 458; *Roberts v. Austin*, 5 Wharton, 313.

I N D E X

TO

THE PRINCIPAL MATTERS.

ABODE.

Place of.—See JOINT STOCK COMPANY, II. 1, 2.

ABORTIVE SCHEME.

See JOINT STOCK COMPANY, I.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALLOTMENT.

See PRESCRIPTIVE RIGHT.

AMENDMENT.

I. *Under the 37th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.*

A. sued B., C., D., E., F., G., and H., in an action of contract: H. suffered judgment by default; and the evidence failed as against F. and G.:—Held, that it was competent to the judge at Nisi Prius to amend the record, under the 37th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, by striking out the names of F. and G., and a proper case for the exercise of his discretion. *Johnson v. Goslett*, 728

II. *Of Pleading.*

When two pleas are demurred to, and the demurrer fails as to one, and the defendant elects to amend the other, the only rule the

court can pronounce is, a rule for the defendant to be at liberty to amend. *Pianciani v. The London and South Western Railway Company*, 326

III. *In the Court of Error.*

Amendment of the record after appeal to the Exchequer Chamber. *Walker v. Bartlett*, 845

ARBITRAMENT.

I. *Compulsory Reference under 17 & 18 Vict. c. 125, s. 3.*

Execution.—The form (No. 10) of the writ of execution, where matter of account is referred to and decided on by an arbitrator, officer of the court, or county court judge, as settled by the judges by the rule of Michaelmas Vacation, 1854, does not dispense with the signing of judgment or the obtaining a rule or order under the 1 & 2 Vict. c. 110, s. 18. *Kendil v. Merrett*, 178

II. *Effect of Bankruptcy upon Agreement to refer.*—See BANKRUPT, IV.

III. *Evidence.*

The court granted a habeas corpus ad testificandum to bring up a prisoner in civil custody for the purpose of giving evidence before an arbitrator. *Marsden v. Overbury*, 34

IV. *Costs.*

1. Where, by the order, the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant,

no costs are payable on either side. *Gribble v. Buchanan*, 691

2. Therefore, where a cause and all matters in difference were referred, the costs of the cause to abide the event of the action, and the costs of the reference and award to abide the event of the award, and the arbitrator found all the issues in favour of the plaintiff, and that he was entitled to recover in the action 80*l.* 14*s.* 11*d.*, and, as to the matters in difference, that there was due from the plaintiff to the defendant 6*l.*, and directed that the defendant should within ten days pay the balance to the plaintiff:—Held, that neither party was entitled to the costs of the reference and award. *Ib.*

ARREST.

Discharge from.

The court will entertain an application for the discharge from custody of a party arrested on a *capias* under the 1 & 2 Vict. c. 110, s. 3, or for the restoration of money deposited on the arrest, where it *plainly* appears that the plaintiff has no cause of action. *Stammers v. Hughes*, 527

ASSURANCE.

See INSURANCE.

ATTACHMENT.

For Disobedience of a Rule of Court.

1. To sustain an attachment for disobedience of a rule of court requiring the party to execute a conveyance, it is not enough merely to serve him with a copy and to show him the original rule: there must be an express demand upon him to do the act which the rule commands him to do. *Swinfen v. Swinfen*, 485

2. This court may issue an attachment for disobedience of a rule drawn up on an order of *Nisi Prius* made at the trial of an issue directed by the Court of Chancery. *Ib.*

The court will not inquire into the authority of counsel to agree to a compromise of a cause at *Nisi Prius*. *Ib.*

4. Service of a rule under the 60th section of the Common Law Procedure Act, 1854, upon the wife of the party, without showing that it came to his knowledge, is not sufficient. *Mason v. Muggerridge*, 642

And see ATTORNEY, II.

ATTORNEY.

I. Negligence.

An attorney received from O. & A., agents of C. L. & Co. of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O. & A.) alleged to be "unpaid and duly protested in their hands." A copy of one

of the bills was sent to the attorney, with a note stating them to be all endorsed to C. L. & Co. The attorney thereupon brought the action in the names of O. & A., and discovering afterwards, when the bills were for the first time shown to him, that there was no special endorsement to O. & A. as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co.:—

Held, that the suing in the names of O. & A. without having first ascertained that they were in a position to maintain an action on the bills, was such *gross negligence* as to disable the attorney from recovering the costs of the abortive action. *Long v. Orri*, 610

II. Attachment against.

An attorney not appearing pursuant to a rule calling on him to answer the matters of the affidavit, on being called three times in open court, a writ of attachment was ordered to be issued against him. *Easton v. Neville*, 548

III. Striking off Roll.

Where an attorney has been struck off the roll of the Court of Queen's Bench for misconduct, he will, on production of the rule for that purpose, be struck off the roll of this court. *In re John Collins*, 272

IV. Readmission.

1. In the year 1847, A. was found guilty of *forgery*, but judgment was respited on the ground that the judge had received evidence which was inadmissible, viz. admissions which the prisoner had been compelled to make when under examination as a witness in an action in the Court of Queen's Bench; and he in consequence received a free pardon. In 1849, A. was struck off the roll for *perjury* in an affidavit of increase:—The court refused in 1856 to readmit him to the roll, although he produced very strong affidavits and testimonials as to his conduct since 1849. *In re Edmund Garbett*, 403

2. An attorney was readmitted, although the rule of Hilary Term, 1853, which requires a copy of the affidavit on which the application is founded, to be left at the chambers of the Chief Justice of the Court of Queen's Bench, had not been complied with. *Ex parte Thomas Makinson*, 661

BANKING COMPANY.

See FRAUDULENT REPRESENTATION, I. 2.

BANKRUPT.

I. Act of Bankruptcy.

1. *Voluntary Conveyance*.]—A., a licensed victualler, was indebted to B. in 570*l.* for goods sold and money advanced. Being pressed for payment, as an inducement for forbearance on the part of B., A., on the 5th of April, 1854,

executed a deed whereby he mortgaged to him the public-house in which the business was carried on, and assigned to him all his trade and other fixtures and household furniture, with a power of sale in case of default in payment of the debt and interest by certain instalments, extending over a period of several months. The value of the property mortgaged was between 300*l.* and 400*l.* The value of A.'s assets at the time was about 1200*l.*; and his debts altogether amounted to 4000*l.* A. continued his business until the 23d of July, when he became bankrupt; having in the mean time received further supplies of goods and advances of money from B., and made various payments to other creditors:—

Held, that the execution of the deed was not an act of bankruptcy,—the assignment not being of the whole (or the whole with a colourable exception) of A.'s property, and the defeating or delaying of creditors, by producing absolute present insolvency and incapacity to carry on trade, not being its necessary result: nor was the deed void as a fraudulent preference of B., it being the result of pressure on his part, and not a voluntary conveyance on the part of A. *Hale v. Allnutt*, 505

2. A trader, in consideration of advances in cash and goods, assigned all his stock to the defendants, to secure such advances and also a debt previously due to them. The goods so assigned comprised all his property, except some household furniture and book-debts. In an action by the assignees of the trader to recover the value of the goods seized under this bill of sale, the judge left it to the jury, with very strong observations, to say whether they would infer an intent to defeat and delay creditors. The jury having found for the plaintiffs,—the court, thinking they might have been misled by the observations of the learned judge, granted a new trial, the costs to abide the event. *Pennell v. Dawson*, 355

II. Petition for Adjudication.

Available Assets.—By the 20th section of the 17 & 18 Vict. c. 119, it is enacted that a trader petitioning for an adjudication of bankruptcy shall forthwith after filing his petition, and before adjudication, make it appear to the satisfaction of the court that *his available estate is sufficient to produce 150*l.* at the least*:—Held, that the decision of the Court of Bankruptcy as to value is conclusive. *Pennell v. Butler*, 209

III. What passes to the Assignees.

In an action for rent upon an indenture of lease, the defendant pleaded the bankruptcy of the plaintiff. The plaintiff replied, that he let the premises to the defendant as trustee for J. B., and that he had no beneficial interest therein, and was suing as such trustee:—Held, that

his being trustee was not material, as he had shown by parol that he had no beneficial interest in the premises. *Houghton v. Kanig*, 235

IV. Effect of Reference by Bankrupt.

1. F. and S. having brought an action against W. to recover the price of timber delivered under a contract, and W. having brought a cross action in which he sought to recover damages against F. and S. for alleged breaches by them of the same contract, the two actions and all matters in difference between the parties, were referred to arbitration. Before anything was done under the reference, F. and S. became bankrupts; and their assignees brought a fresh action against W. for the price of the timber.

Upon a motion, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to stay the proceedings in the last-mentioned action:—Held, that, assuming the section to apply to such a case (which the court inclined to think it did not), it was not one in which they would in the exercise of their discretion interfere, inasmuch as by so doing they would be giving W. an advantage which the law did not entitle him to. *Pennell v. Walker*, 651

2. *Semble*, that assignees of a bankrupt are not "persons claiming through or under the bankrupt," within the meaning of the above section. *Id.*

V. *Condition or Agreement within 12 & 13 Vict. c. 106, s. 145.*—See *Maples, App., Pepper, Resp.*, post, VI.

VI. *Contingent Liability under 12 & 13 Vict. c. 106, s. 178.*

Ten years ago, A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago, A. permitted B. to make a communication through the party-wall, and to make other alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt; and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them:—

Held, that the "damages resulting from the non-compliance with the condition upon which the permission to alter was given," did not constitute "a liability to pay money upon a contingency," within the 178th section of the 12 & 13 Vict. c. 106; and that the condition or agreement above specified, to restore the premises to their previous state, was not a condition or agreement within s. 145. *Maples, App., Pepper, Resp.*, 177

BILL OF EXCHANGE.

Liability of Acceptor.

A. accepted a bill for 1000*l.* for the accommodation of B. A bill for that amount, purporting to be drawn by B. and accepted by A., and by B. endorsed to C., and by C. to D. (for value), was afterwards presented to A. for payment. A. having had an opportunity of inspecting the bill, gave D. a check for 100*l.* and a renewed bill at three months (similarly drawn and endorsed) for 1000*l.*, in exchange for the bill so presented to him. A. afterwards discovered that the acceptance to the bill so delivered up to him was forged:—Held, no answer to an action at the suit of C. upon the substituted bill.

Mather v. Lord Maidstone,

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BUILDING CONTRACT.

See CONTRACT, I. 1, 2.

CARRIER.

Notice to limit Liability.

To a count charging the defendants, common carriers by railway from London to Southampton and thence to Jersey by steam-vessels, charging them with the loss of a passenger's portmanteau,—the defendants pleaded that the goods contained in the portmanteau were writings, silks, furs, and lace, within the meaning of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the defendants, "then being common carriers by land for hire, to be carried by them, as such carriers by land, over their said railway;" that such delivery was made to the servants of the defendants; that, at the time of such delivery, the value and nature of the said goods were not declared by the plaintiff; and that the non-delivery of the said goods to the plaintiff in the count complained of was by reason of the same being lost by the defendants out of their possession while the same were upon the railway of the defendants, and in their possession and under their care as such carriers by land as aforesaid:—Held, a good plea.

Pianciani v. The London and South Western Railway Company,

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CAUSE OF ACTION.

See COURT, II. 2.

CERTIFICATE.

For Costs.

The court will not enlarge the time for showing cause against a rule to enter a suggestion under the City Small Debts Act, to deprive the plaintiff of costs, in order to enable the plaintiff to apply to the judge for a certificate.

Ward v. Cardwell,

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CHARTER-PARTY.

I. Construction of.

1. By a charter-party it was agreed that "the good ship the *Elizabeth, A. 1,*" then bound to Havre, should with all convenient speed sail and proceed to the north of England for coals, and from thence proceed to Limerick, where the charterer engaged to put on board a full cargo of grain or other lawful merchandise for London. The charter-party contained the usual exception of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation." In consequence of sea perils, the vessel was so long delayed on her voyage to the north of England, that she did not arrive at Limerick until the grain export trade from that place was over, and she had in the mean time run out of her letter.

In an action against the charterer for not loading a cargo:—Held, that there was no warranty that the ship should continue *A. 1*,—that evidence as to the state of the corn trade at Limerick was irrelevant and inadmissible,—and that the exception as to the dangers of the seas, &c., was inapplicable. *Huret v. Osborne,* 144

2. *Turn of Loading.*—The defendants chartered a ship from Sunderland to Carthage, engaging that she should "with all possible despatch load in the south dock, in the customary manner, from the defendants' agents, a full and complete cargo of coke, to be loaded in regular turn." In an action for not loading the ship "in regular turn," pursuant to the charter-party,—Held, that evidence was not admissible to show, that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait his turn according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable despatch was used. *Hudson v. Clementson,* 213

3. By a charter-party for a voyage from Sundswall to Southampton, it was stipulated that the owner should receive "the highest freight which he could prove [or 'prove by evidence'] to have been paid for ships on the same voyage or passage by water when the vessel passed Kilmore inwards, but not less than 90*s.* per St. Petersburg standard hundred:—"

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the charter-party did not contemplate strict legal proof of the actual payment of the higher rate of freight, but reasonable evidence that such higher freight had been paid or contracted to be paid; and that the owner could not entitle himself to a higher rate of freight than 90*s.*, by proving that other vessels had been chartered at such higher rate for a voyage to London,—that not being, within the fair intendment of the charter-party, the same voyage.

Gether v. Copper,

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II. *Stamping.*—See EVIDENCE, III.

COMMISSION.

See CONTRACT, I. 4.

COMMON.

See WASTE.

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 Vict. c. 125.)

Section 3.—*Compulsory Reference.*

An order was obtained by the plaintiff for a reference to the master under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125); but, the master declining to take it, the plaintiff obtained an order to rescind the former order and proceed to trial:—Held, that the plaintiff was not entitled to the costs of these proceedings as costs in the cause. *Gribble v. Buchanan*, 691

Execution.—The form (No. 10) of the writ of execution, where matter of account is referred to and decided on by an arbitrator, officer of the court, or county court judge, as settled by the judges by the rule of Michaelmas Vacation, 1854, does not dispense with the signing of judgment or the obtaining a rule or order under the 1 & 2 Vict. c. 110, s. 18. *Kendall v. Merrett*, 173

Section 11.—*Staying Proceedings after Agreement to refer.*

F. and S. having brought an action against W. to recover the price of timber delivered under a contract, and W. having brought a cross action in which he sought to recover damages against F. and S. for alleged breaches by them of the same contract, the two actions and all matters in difference between the parties, were referred to arbitration. Before anything was done under the reference, F. and S. became bankrupts; and their assignees brought a fresh action against W. for the price of the timber.

Upon a motion, under the 11th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to stay the proceedings in the last-mentioned action:—Held, that, assuming the section to apply to such a case (which the court inclined to think it did not), it was not one in which they would in the exercise of their discretion interfere, inasmuch as by so doing they would be giving W. an advantage which the law did not entitle him to. *Pennell v. Walker*, 651

Section 37.—*Striking out Defendants.*

A. sued B., C., D., E., F., G., and H., in an action of contract: H. suffered judgment by default; and the evidence failed as against F.

and G.:—Held, that it was competent to the judge at Nisi Prius to amend the record, under the 37th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by striking out the names of F. and G., and a proper case for the exercise of his discretion. *Johnson v. Gozlett*, 728

Section 44.—*Costs on New Trial.*

Semble, that the 44th section of the Common Law Procedure Act, 1854, which in some measure places the costs, on motions for new trials on the ground of the verdict being against evidence, in the discretion of the court, has not altered the rule which precludes the grant of a new trial in such cases where the damages are under 20*l.* *Hawkins v. Alder*, 640

Section 46.—*Inspection of Documents.*

Upon a rule to rescind an order for a review of the master's taxation, it being objected that neither the rule nor the affidavits upon which it was drawn up disclosed what the taxation was,—The court, in the exercise of their discretion under the 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and without imposing any terms, ordered the allocatur to be produced for their inspection. *Ashcroft v. Foulkes*, 261

Sections 51—53.—*Interrogatories.*

1. *Semble*, that the answers to interrogatories under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, ought not to be general, but should answer, or assign reasons for refusing to answer, each interrogatory specifically. *Chester v. Wortley*, 239

2. Where a party objects to the sufficiency of the answers, and seeks to have a *vivâ voce* examination under s. 53, he must apply promptly. *Id.*

3. It is no ground for refusing to answer interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions. *Tetley v. Easton*, 643

Section 60.—*Attachment against Judgment-Debtor.*

Service of a rule under the 60th section of the Common Law Procedure Act, 1854, upon the wife of the party, without showing that it came to his knowledge, is not sufficient. *Mason v. Muggersidge*, 642

Sections 61—63.—*Garnishment Clauses.*

1. To an action for work and labour, &c., the defendant pleaded that B. recovered judgment against the plaintiff, and, being such judgment-creditor, applied for and obtained an order

under the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, that the debt due from the now defendant to the plaintiff should be attached to answer the judgment so recovered against the plaintiff by B., that the debt was still unsatisfied, and that the order still remained in force:—Held, a bad plea, for not alleging that the order was served upon, or notice thereof given to, the garnishee. *Lockwood v. Nash*, 536

2. Held, also, that recourse could not be had to the replication for the purpose of curing the defect in the plea. *Ib.*

3. *Quære*, as to the effect of an order *duly served*, as to *binding* the debt in the hands of the garnishee? *Ib.*

4. An order upon a garnishee, under the 63d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, has no operation upon debts of which the judgment-debtor has already divested himself by assignment. *Hirsh v. Coates*, 757

COMPROMISE.

See COUNSEL.

CONCURRENT JURISDICTION.

See COUNTY COURT, II.

CONDITION PRECEDENT.

What amounts to.

1. By an agreement between A. and B., it was agreed that A. should do all acts necessary (except the advance of money) for the purpose of procuring and perfecting certain letters patent, and should *immediately after the same were procured* execute an assignment of one third share therein to B.: and B. agreed to pay all fees and disbursements that might be necessary for procuring the letters patent, enrolling the specification, and otherwise in *perfecting* the same.

By the 16 & 17 Vict. c. 5, s. 2, it is enacted that all letters patent shall be made subject to the condition that the same shall be void, and the privileges thereby granted shall cease and determine, at the end of three years and seven years respectively, unless there be paid before the expiration of the said three and seven years respectively two several sums of 50*l.* and 100*l.* as therein mentioned:—

Held, that the execution of an assignment by A. was the *whole* consideration for the undertaking of B. to pay the sums mentioned in that section; and, consequently, a condition precedent to his right to sue B. for the non-payment thereof. *Hill v. Mount*, 72

2. A policy of assurance entered into with a mutual insurance association contained amongst others a regulation (the sixteenth) which provided, that, if a ship insured in the association

should be mortgaged for any debt, the owner, being a member of the association, should not have any claim by virtue of the policy, nor should any assignee of such policy have any claim for any loss, unless previously to such loss such member should have delivered to the secretary an *undertaking in writing of the mortgagee or assignee* to pay all sums which might thereafter become due from such member in respect of such ship.

In an action upon the policy for a total loss, the defendant pleaded, that the ship was mortgaged, and that the plaintiff did not previously to the happening of the loss deliver to the secretary an undertaking of the mortgagees to pay all moneys, which might thereafter become due from the plaintiff in respect of the ship.

The plaintiff replied, that the defendant had notice of the mortgage, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagees all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff as a member of the association became liable.

Held, that the replication was no answer to the plea,—the giving of the undertaking required by the sixteenth regulation being a condition precedent. *Hughes v. Tindall*, 98

3. By agreement dated the 15th of May, 1855, the plaintiff covenanted *forthwith* to procure a vessel and stow on board a certain telegraphic cable then at M.'s wharf, and to rig, provision, and man her, and to have her ready for sea at the Nore on or before the 15th of July: and the defendant covenanted to pay the plaintiff 5000*l.* by instalments,—1000*l.* *seven days* after the arrival of the vessel at M.'s wharf, 2000*l.* on or before the expiration of *twenty-one days* after the vessel should have arrived alongside M.'s wharf, and the remaining 2000*l.* as soon as the ship should put to sea from the Nore, and also to give the plaintiff 500 shares in a certain company. It was also mutually agreed that each party should, within *ten days* of the execution of the agreement, give and execute to the other a bond with two sureties, in the sum of 5000*l.*, for the due performance of the covenants on his part.

In an action upon this agreement, the breaches assigned being, non-payment by the defendant of the 5000*l.*, or any part thereof, and non-delivery of the shares:—

Held, that the execution of the bond by the plaintiff was a condition precedent to his right to sue for such breaches. *Roberts v. Brett*, 561

4. The declaration stated, that, by an agreement made between the plaintiff and W. and D., it was agreed, that, in consideration of the plaintiff agreeing to supply one F. with timber to the value of 200*l.*, the said W. and D. severally agreed to guaranty to the plaintiff the

due payment of any amount for such timber not exceeding 200*l.*, within six months from the date of the sale of the said timber; that, in pursuance of the said agreement, the plaintiff supplied timber to the amount of 153*l.* 10*s.* 1*d.* to F.; that afterwards, and whilst the said timber was unpaid for, and before the period of six months from the date of the sale had elapsed, the plaintiff became dissatisfied with such guarantee so given by W. and D.; and thereupon by another agreement between the plaintiff and the defendant, after reciting the said guarantee, that the plaintiff had delivered timber to the value of 153*l.* 10*s.* 1*d.*, and that the plaintiff was not satisfied with such guarantee, the defendant, at the request of W. and D., in consideration of the premises, and of the plaintiff forbearing to take any proceedings against W. and D., guaranteed to the plaintiff payment of the said sum of 153*l.* 10*s.* 1*d.* on the 13th of December then next. Breach, that, although the plaintiff had done all things on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, the defendant had not paid the same, or any part thereof.

Fourth plea,—that the plaintiff had not done everything on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, inasmuch as he the plaintiff did not forbear to take the said proceedings in the declaration mentioned against the said W. and D., but, on the contrary, took such proceedings before the said 13th of December next after the making of the said alleged agreement:—

Held, on motion in arrest of judgment, that the plaintiff's forbearance to sue W. and D. before the day named, was a condition precedent to his right of action against the defendant on the guarantee. *Rolt v. Cosens*, 673

CONTINGENT LIABILITY.

See BANKRUPT, VI.

CONTRACT.

I. Construction of.

1. By a contract for the building of a borough gaol, it was provided, amongst other things,—“that no alterations should be made without the written authority of the architect, by whom the value of such alterations should be ascertained; and that no allowance for alterations should be made, unless the value of the same was ascertained at the time the work was done, and entered in a book, such entry to be submitted to and approved of by the architect,”—“that no payments should be made to the contractors, except on the production of a certificate from the architect that a certain amount of work had been done; and that the architect should deliver his certificate thereof at the end

of every fourteen days,”—and “that the contractors should be entitled to receive at the end of every fourteen days the amount for which the architect should have given his certificate; the amount of such certificate to be less by certain varying proportions than the value of the work done, until 90 per cent. of the whole should be completed; and that no further payments should be made to the contractors until three calendar months after the architect should have certified the completion of the whole work to his satisfaction, when one-half of the remainder should be paid, and the balance at the end of twelve months from the date of the architect's certificate of completion.”—

Held, that the architect's certificate of final completion was sufficient, without mentioning the amount remaining due. *Pashby v. The Mayor, &c., of Birmingham*, 2

2. By the contract it was further provided, that, if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference, or question should be settled by the architect, whose decision thereon should be absolute and final:—Held that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and the corporation as to their claim for extras. *Id.*

3. By agreement in writing, A. was appointed surveyor or agent of B., for two years and a half, at a salary of 200*l.* per annum, payable quarterly; and A. was in addition to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. The agreement contained a stipulation “that under no pretence whatsoever should A. contract any debt in the name of B., or be considered as his agent to receive any money on his account,” and a proviso, that, in the event of a breach, the agreement should immediately cease and determine.

To an action against B. for dismissing A. before the expiration of the term, B. pleaded (thirdly) that A., whilst he was such surveyor, contrary to the agreement, and without his knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from them to B., as and under the pretence of being B.'s agent in that behalf,” &c.:—

Held, that the receipt by A. of deposit-money from persons to whom he had agreed to let houses on account of B. was a breach of the agreement, and a cause of dismissal; and that proof that he had done so sustained the third plea. *Bray v. Chandler*, 718

4. A. also claimed commission for letting certain houses. As to this, the evidence was,

that the agreement for the letting was entered into with another agent, K., but that the tenants were introduced to K. by A.—Held, that under the terms of the agreement, A. was entitled to the commission. *Bray v. Chandler*, 718

And see PRINCIPAL AND AGENT.

II. Measure of Damages on Breach of.

See DAMAGES, 1.

CONVERSION.

See TROVER.

COPYRIGHT.

I. Infringement.

1. The first count of the declaration stated that a certain song of which the plaintiffs were the proprietors had been sung by a certain eminent singer at certain public concerts, and had acquired great popularity, and became in great demand; that the plaintiffs published it with a likeness of the singer on the outside leaf; and that the defendant, after such publication thereof by the plaintiffs, deceitfully and fraudulently, and without their consent, caused to be printed another song, the music, melody, and words whereof closely resembled the music, melody, and words of the plaintiffs' song, and with an outside leaf bearing the likeness of the same singer, and similar words to those of the plaintiffs' song, with the fraudulent intention of representing and inducing a belief that it was the song of the plaintiffs, and deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers thereof, under the false colour and pretence that it was the song so published by the plaintiffs; whereby the plaintiffs were injured in the sale of their said song.

The second count was substantially the same, but limited to the piratical use of the title-page and devices on the outside leaf of the plaintiffs' song.

The third count stated that the plaintiffs were the proprietors of the copyright in a certain book, and that the defendant, without their consent in writing, wrongfully and injuriously printed for sale divers copies of the said work, contrary to the form of the statute in such case made and provided, whereby the plaintiffs' profits were lessened.

The fourth count charged the defendant with "having in his possession for sale, and selling," divers copies of the work so unlawfully and without the consent of the plaintiffs printed.

The defendant pleaded,—to the whole declaration,—that the song in question was printed and published without the name and place of abode of the printer upon the first or last

leaves thereof, in violation of the statute 2 & 3 Vict. c. 12:—

Held, that the plea disclosed no defence as to the charges in the third and fourth counts; and *semble* that it could not be taken distributively. *Chappell v. Davidson*, 194

2. *Quære*, whether the third and fourth counts were bad for not showing that the alleged infringement of copyright took place in England? *Ib.*

3. *Quære*, whether the want of an allegation in the third and fourth counts, that the copyright had been registered at Stationers' Hall, pursuant to the 5 & 6 Vict. c. 45, s. 24, was an answer to the action? *Ib.*

4. *Semble*, that the non-registration should at all events have been pleaded. *Ib.*

II. Expunging or varying Entry at Stationers' Hall.

1. The court will not exercise its power under the 14th section of the Copyright Act, 5 & 6 Vict. c. 45, to expunge an entry of proprietorship of copyright in the registry book at Stationers' Hall, unless it be clearly and unequivocally shown that it is false,—or vary it, unless satisfied by affidavit that in so doing they would make a true entry,—repudiating the power exercised by the Court of Queen's Bench in *Ex parte Davidson*, 2 E. & B. 577. *Ex parte Davidson*, 297

2. The author of a song being in America, and wishing to secure to himself the copyright in England and in America, by a simultaneous publication in both countries, sent instructions to his publishers here to publish it in London on a given day. The publishers did so, and caused an entry to be made in the registry book at Stationers' Hall, in which they described *themselves* as the proprietors of the copyright. A. pirated the song in this country, and the author afterwards procured a judge's order to vary the entry by substituting *his* name as the proprietor, and obtained an injunction, and brought an action against A. for the infringement of his right.

Quære whether, under these circumstances, A. was a "party aggrieved" within the 14th section of the Copyright Act, so as to be entitled to ask the court or a judge to expunge or vary the amended entry? *Ib.*

CORPORATION.

Whether an action for a fraudulent representation will lie against a trading corporation,—*quære*? *Semble*, per Willes, J., that it will. *Lawson v. The Bank of London*, 84

COST-BOOK MINE.

See MINE.

COSTS.

I. *Of Mortgage.*

The proposed mortgagee's solicitor has no claim for his charges against the proposed mortgagor where the negotiation for the mortgage goes off through the default of the latter: he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expense. *Wilkinson v. Grant*, 319

II. *Of Abortive Proceeding.*

An order was obtained by the plaintiff for a reference to the master under the 3d section of the Common Law Procedure Act, 1854, 17 & Vict. c. 125; but the master declining to take it, the plaintiff obtained an order to rescind the former order, and proceeded to trial:—Held, that the plaintiff was not entitled to the costs of these proceedings as costs in the cause. *Gribble v. Buchanan*, 691

III. *Of County Court Appeal.*

The successful party on an appeal from a decision of a county court is entitled to the costs of the appeal. *Foster, App., Smith, Resp.*, 161

IV. *Of Reference and Award.*

See ARBITRAMENT, IV.
COUNTY COURT, II.

COUNSEL.

Authority of.

The court will not inquire into the authority of counsel to agree to a compromise of a cause at Nisi Prius. *Swinfen v. Swinfen*, 485

COUNTERPART.

See EVIDENCE, IV.

COUNTY COURT.

I. *Appeal from.*

1. On a trial in the county court, the plaintiff having closed his case, it was submitted by the advocate on the part of the defendants that there was no evidence to go to the jury. The judge deciding that there was, evidence was offered on the part of the defendants, and a verdict was ultimately found for the plaintiff:—Held, that the defendants did not by calling witnesses preclude themselves from appealing on the ground that the judge had ruled erroneously. *The Great Northern Railway Company, App., Rimell, Resp.*, 575

2. *Costs.*—The successful party on an appeal from a decision of a county court is entitled to the costs of the appeal. *Foster, App., Smith, Resp.*, 161

II. *Costs.*

1. Unless the plaintiff, in an action of contract for which a plaint might have been entered in the county court, recovers more than 20*l.*, whatever the amount of his claim, and whether reduced by payment, by tender, or by set-off, he is by the 11th section of the 13 & 14 Vict. c. 61, deprived of costs, unless the judge certifies at the trial, under s. 12, or he obtains a rule or order under the 15 & 16 Vict. c. 54, s. 4. *Ashcroft v. Foulkes*, 261; *Rumley v. Irwin*, 312

2. The plaintiff was a butcher carrying on his business within the jurisdiction of the county court of A. The defendant resided within the jurisdiction of the county court of B. The plaintiff sued the defendant in the superior court for a bill, some of the items of which consisted of goods which had been ordered in the A. district, but delivered in the B. district:—Held,—confirming *Grimbley v. Aykroyd* and *Wood v. Perry*,—that the whole formed one “cause of action,” and, as a part of it arose in the jurisdiction within which the defendant resided (and within 20 miles), there was no concurrent jurisdiction within the 9 & 10 Vict. c. 95, s. 128, and consequently the plaintiff was not entitled to costs. *Bonsey v. Wordsworth*, 326

3. The court will not enlarge the time for showing cause against a rule to enter a suggestion under the city small debts act, to deprive the plaintiff of costs, in order to enable the plaintiff to apply to the judge for a certificate. *Ward v. Cardwell*, 639

COVENANT.

I. *Construction of.*

1. By indenture A. demised to B. a messuage and premises for twenty-one years. The lease contained a covenant to repair, and a covenant that B., his executors, administrators, and assigns should, at the determination of the term, yield up the premises to the plaintiff, his executors, &c., “together with all wainseats, windows, shutters, fastenings, &c., and other things which then were or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings, and improvements which should be erected, built, or made upon the demised premises, in good repair and condition.”

An assignee of the lease, during the term, removed an old shop window, and put up in its place a plate-glass front, but without in any manner fastening it (except by means of wedges) to the premises:—

Held, that, whether an “improvement” within the meaning of the covenant or not, this plate-glass front was at all events a “window” be-

longing to the demised premises, and therefore that it could not be removed. *Burt v. Haslett*, 162

2. Affirmed, on error, *Haslett v. Burt*, 893

II. Implied Covenant.

Covenant. The first count alleged that the defendant and one L. carried on business in copartnership, and that, by indenture between the defendant and L. of the first part, the plaintiffs of the second part, &c., it was witnessed that the defendant and L., and each of them, granted, assigned, and transferred to the plaintiffs all the copartnership stock, debts, sums of money, and all other the personal estate and effects and property of them the defendant and L. as such copartners. It then averred, that, at the time of the making of the indenture, the defendant was indebted to the copartnership in 240*l.*, being part of the debts, sums of money, and personal estate and effects and property of the defendant and L., as such copartners; and it assigned for a first breach, non-payment of the 240*l.*

There was a second breach, alleging that, at the time of the making of the indenture, a bill of exchange for 120*l.*, payable to the order of the defendant, and then being in the possession of the defendant, was part of the personal estate and effects and property of the defendant and L. as such copartners, and that the defendant made default in transferring the said bill of exchange, and the right to the money therein specified, to the plaintiffs, and, after the making of the indenture, incapacitated himself from so doing, and from conferring on the plaintiffs any right or title to receive the money specified in the said bill, by then parting with the possession of the said bill in such manner and on such terms as so to incapacitate himself, and thereby the defendant prevented the plaintiffs from acquiring or having any right or title as aforesaid to the said money, contrary to the said indenture:—

Held, on demurrer,—that there was no implied covenant on the part of the defendant to pay to the plaintiffs the sum due from him to the copartnership, and therefore that the defendant was entitled to judgment on the first breach,—but that there was an implied covenant on his part not to do anything in derogation of his deed, and therefore that the plaintiffs were entitled to judgment as to the second breach. *Aulton v. Athine*, 249

CRASSA NEGLIGENTIA.

See ATTORNEY, I.

CROWN GRANT.

See PRESCRIPTIVE RIGHT.

DAMAGES.

Measure of.

1. *On Breach of Contract.*—Upon the breach of a contract for the sale of shares, the proper measure of damages is the difference between the contract price and the market price at the time of the breach. *Powell v. Jessop*, 336

2. *In Action for an irregular Distress.*—The 11 G. 2, c. 19, s. 19, only entitles the tenant to recover in an action for any irregularity in dealing with a distress, when actual damage is proved.

The plaintiff declared in case for an irregular distress, alleging in one count that the defendant having distrained certain growing wheat as a distress for rent, and having caused the same to be cut and carried away, instead of impounding, appraising, and selling the same, suffered other persons to carry the same away and convert the same to their own use, whereby the plaintiff was injured, and was deprived of the surplus.

There was also a count in trover.

The evidence was, that the defendant seized the plaintiff's growing wheat as a distress for rent and sold it (for its full value) on the premises in a growing state,—that the purchaser cut the wheat, and carried it away,—and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff. The jury found that the plaintiff sustained no damage by the transaction:—

Held, that, upon these facts, and upon this finding, the plaintiff was not entitled to recover even nominal damages upon either count. *Rodgers v. Parker*, 112

3. *Against a Joint Stock Company, for withholding Shares.*—In an action against a joint stock company for improperly withholding shares after a tender of the sum due for calls and interest, the proper measure of damages is the value of shares at the market price of the day of the tender, deducting the amount of calls and interest. *Cockerell v. The Van Diemen's Land Company*, 454

DEFAMATION.

Privileged Communication.

The defendant having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each (in the absence of the other) that he (or she) was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other:—Held, a privileged communication. *Manby v. Witt*, 544; *Eastmead v. Witt*, 544

DEMURRER.

Argument of.

Where two pleas are demurred to, and the

demurrer fails as to one, and the defendant elects to amend the other, the only rule the court can pronounce is, a rule for the defendant to be at liberty to amend. *Pianciani v. The London and South Western Railway Company*, 226

DEPOSIT.

See *JOINT STOCK COMPANY, I.*

DISTRESS.

Effect of Payment of Rent Under.

1. Payment of rent under a distress is not a conclusive admission of title in the distrainer, but may be rebutted by showing that he never had any title. *Knight v. Cox*, 645

2. The plaintiff claimed as executrix and devisee of the administratrix of one of three lessors, and showed that rent had been paid by the defendant (the lessee) to her testatrix and to herself,—on two occasions, after distress:—Held, that this *prima facie* case was answered by showing that one of the other lessors was still living. *Ib.*

DISTRIBUTIVE PLEA.

See *PLEADING, II.*

EASEMENT.

I. Right of Way.

Period of Enjoyment.—The enjoyment of an easement as of right, for twenty (or forty) years next before the commencement of the suit, within the statute 2 & 3 W. 4, c. 71, means a continuous enjoyment as of right, for twenty (or forty) years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year: and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (or forty) years. *Battisbill v. Reed*, 696

Therefore, where the plaintiff had enjoyed a way as of right, and without interruption, from 1800 to 1855, when the action was brought:—Held, that his claim under the statute was defeated by a unity of possession from 1843 to 1855. *Ib.*

II. Eaves-Drip.

Measure of Damages.—In an action by a reversioner for the removal of the eaves from his house, and the erection of a building with eaves and a gutter overhanging his wall,—evidence of diminution of the saleable value of the plaintiff's premises in consequence of the nuisance was rejected; and, it appearing that the cost of replacing the tiles which had been removed would not exceed 30s., and the defendant hav-

ing paid 40s. into court on account thereof, the jury were directed to find for the defendant, if they thought the sum paid in was sufficient to cover the actual damages sustained by the plaintiff:—

Held, that the evidence tendered was properly rejected, and the direction right,—the true measure of damages in such a case being, not the diminution in the saleable value, although the nuisance might be of a permanent character, but such damages as the jury might think sufficient to compel the defendant to abate the nuisance. *Battisbill v. Reed*, 696

ENCLOSURE.

See *PRESCRIPTIVE RIGHT.*

EVIDENCE.

I. To take a Case out of the Statute of Limitations.

A. and B., bankers at Frankfort, sued C. on a bill of exchange which became due on the 2d of December, 1848. The defendant pleaded the statute of limitations; to which the plaintiffs replied, that, at the time of the accruing of the causes of action, they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years before the commencement of the action.

In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill and the year 1851; and that his partner, B., had never been in England. Upon cross-examination, he admitted that B. was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—

Held, that this was evidence to go to the jury; and that it was not necessary to call B. himself to negative his having been in England. *Koch v. Shepherd*, 191

II. To explain a written Contract.

The defendants chartered a ship from Sunderland to Carthage, engaging that she should "with all possible despatch load in the south dock, in the customary manner, from the defendants' agents, a full and complete cargo of coke, to be loaded in regular turn." In an action for not loading the ship "in regular turn," pursuant to the charter-party,—Held, that evidence was not admissible to show, that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait his turn according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable despatch was used. *Hudson v. Clementson*, 213

And see *Gillett v. Offor*, 905.

III. *Presumptive Evidence.*

An unstamped charter-party was within the fourteen days allowed by the 5 & 6 Vict. c. 79, s. 21, for stamping such instruments without payment of a penalty, delivered at the office of the sub-distributor of stamps at C., for the purpose of its being transmitted to London to be stamped, the proper amount of stamp-duty and postage being left with it. The clerk in that office to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands: but they said, that, if it did, it would in usual course be returned to the district-office in the country. The clerk at C. could not say whether the document was returned to him or not; but he stated, that, on search being made for it, no trace of it could be discovered:—

Held, that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents. *Closmadesuc v. Carrel*, 36

IV. *Counterpart of Lease.*

In an action for rent upon an indenture of lease, the defendant pleaded non demisit. The counterpart was held sufficient evidence of the demise. *Houghton v. Kammig*, 235

V. *Acts of Ownership.*

Upon a question whether a piece of waste land lying between a highway and the plaintiff's enclosed land belonged to the plaintiff, or to the lord of the manor:—Held, that grants by the lord of other slips of waste land on either side of the same road, abutting on enclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the locus in quo was part of the waste of the manor, without showing continuity. *Dendy v. Simpson*, 831

EXECUTION.

On a Reference under the 17 & 18 Vict. c. 125, s. 3.

The form (No. 10) of the writ of execution, where matter of account is referred to and decided on by an arbitrator, officer of the court, or county court judge, as settled by the judges by the rule of Michaelmas Vacation, 1854, does not dispense with the signing of judgment or the obtaining a rule or order under the 1 & 2 Vict. c. 110, s. 18. *Kendil v. Merrett*, 173

FALSE REPRESENTATION.

See FRAUDULENT REPRESENTATION.

FELONY.

To entitle the owner of stolen property to maintain an action for converting it against a third person, in whose possession he finds it, is not necessary that he should first have prosecuted the felon. *Lee v. Bayce*, 599

And see RAILWAY COMPANY, II. 3.

FIXTURES.

See LANDLORD AND TENANT, V.

FORBEARANCE.

See GUARANTEE.

FOREST.

See PRESCRIPTIVE RIGHT.

FORFEITURE.

See JOINT STOCK COMPANY, II.

FORGERY.

See BILL OF EXCHANGE.

FOREIGN PRINCIPAL.

See PRINCIPAL AND AGENT.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See BANKRUPT, I.

FRAUDULENT REPRESENTATION.

1. *For Misrepresentation as to the Character and Credit of a Third Person, under 9 G. 4, c. 14, s. 6.*

1. An action will lie for a false representation in writing as to the character and circumstances of a third person, whereby the plaintiff was induced to give credit to such third person, although the plaintiff might have been in part influenced by subsequent oral representations of the defendant,—if the jury are satisfied that the plaintiff was substantially induced by the written representation to give the credit. *Tutton v. Wade*, 371

2. A declaration stated that the plaintiff had established a bank in London called "The Bank of London," and was the first person who had established a bank by or under that name, and had established the said bank at great expense, and caused the name to be published and affixed on the offices of the said bank, so that the same might be seen and known by the public, and had caused prospectuses of the said bank to be printed and circulated with

the said name and title of "The Bank of London" thereon, and the said bank was then commonly known by the name of, and was the only bank named or styled "The Bank of London;" whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to allege that the defendants, intending to injure the plaintiff in his said bank, and the said business of his said bank, afterwards, and while his said bank was the only bank named or styled "The Bank of London," wrongfully and fraudulently established a certain other bank in London under the name, style, and title of "The Bank of London," in imitation of, and as representing, the said Bank of London of the plaintiff, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false colour and pretence that the same was the bank established by the plaintiff; and that thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him, so fully and extensively as he would otherwise have done, and had been deprived of profits, and that by means of the premises divers persons were induced to believe and did believe that the bank so established by the defendants was the bank called "The Bank of London" established by the plaintiff:—

Held, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker. *Lawson v. The Bank of London*, 84

3. Whether an action of this description will lie against a (trading) corporation,—*quære?* *Ib.*

4. *Semble*, per Willes, J., that it will. *Ib.*

II. In course of a judicial Proceeding.

No action lies against a man for a statement made by him, whether by affidavit or *viva voce*, in the course of a judicial proceeding, even though it be alleged to have been made "falsely and maliciously, and without any reasonable or probable cause." *Revis v. Smith*, 126

GARNISHMENT.

See COMMON LAW PROCEDURE ACT, 1854, ss. 61—63.

GRANT.

See PRESCRIPTIVE RIGHT.

GUARANTEE.

Construction of.

1. The declaration stated, that, by an agreement made between the plaintiff and W. and D., it was agreed, that, in consideration of the plaintiff agreeing to supply one F. with timber to the value of 200*l.*, the said W. and D. severally agreed to guaranty to the plaintiff the

due payment of any amount for such timber not exceeding 200*l.*, within six months from the date of the sale of the said timber; that, in pursuance of such agreement, the plaintiff supplied timber to the amount of 153*l.* 10*s.* 1*d.* to F.; that afterwards, and whilst the said timber was unpaid for, and before the period of six months from the date of the sale had elapsed, the plaintiff became dissatisfied with such guarantee so given by W. and D.; and thereupon by another agreement between the plaintiff and the defendant, after reciting the said guarantee, that the plaintiff had delivered timber to the value of 153*l.* 10*s.* 1*d.*, and that the plaintiff was not satisfied with such guarantee, the defendant, at the request of W. and D., in consideration of the premises, and of the plaintiff forbearing to take any proceedings against W. and D., guarantied to the plaintiff payment of the said sum of 153*l.* 10*s.* 1*d.* on the 13th of December then next. Breach, that, although the plaintiff had done all things on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, the defendant had not paid the same, or any part thereof.

Fourth plea,—that the plaintiff had not done everything on his part to entitle him to be paid by the defendant the said sum of 153*l.* 10*s.* 1*d.*, inasmuch as he the plaintiff did not forbear to take the said proceedings in the declaration mentioned against the said W. and D., but, on the contrary, took such proceedings before the said 13th of December next after the making of the said alleged agreement:—

Held, on motion in arrest of judgment, that the plaintiff's forbearance to sue W. and D. before the day named, was a condition precedent to his right of action against the defendant on the guarantee. *Rolt v. Cozens*, 673

2. *Semble*, that the guarantee imported a forbearance to sue W. and D. until the 13th of December next after its date. *Ib.*

HABEAS CORPUS.

Ad testificandum.

The court granted a habeas corpus *ad testificandum* to bring up a prisoner in criminal custody for the purpose of giving evidence before an arbitrator. *Marsden v. Overbury*, 24

HORSE.

Warranty of Sale of.—See SALE, II.

IMPROVEMENTS.

See LANDLORD AND TENANT, V.

INSPECTION OF DOCUMENTS.

Under 17 & 18 Vict. c. 125, s. 46.—See PRACTICE, VI.

INSURANCE.

Construction of Policy.

A policy of assurance entered into with a mutual insurance association contained amongst others a regulation (the sixteenth) which provided, that, if a ship insured in the association should be mortgaged for any debt, the owner, being a member of the association, should not have any claim by virtue of the policy, nor should any assignee of such policy have any claim for any loss, unless previously to such loss such member should have delivered to the secretary an undertaking in writing of the mortgagees or assignee to pay all sums which might thereafter become due from such member in respect of such ship.

In an action upon the policy for a total loss, the defendant pleaded, that the ship was mortgaged, and that the plaintiff did not previously to the happening of the loss deliver to the secretary an undertaking of the mortgagees to pay all moneys, which might thereafter become due from the plaintiff in respect of the ship.

The plaintiff replied, that the defendant had notice of the mortgage, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagees all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff as a member of the association became liable:—

Held, that the replication was no answer to the plea,—the giving of the undertaking required by the sixteenth regulation being a condition precedent. *Hughes v. Tindall*, 98

INTEREST IN LAND.

See MINE, II.

STATUTE OF FRAUDS, 1.

INTERROGATORIES.

Under 17 & 18 Vict. c. 125, s. 51.

1. *Semble*, that the answers to interrogatories under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, ought not to be general, but should answer, or assign reasons for refusing to answer, each interrogatory specifically. *Chester v. Wortley*, 239

2. Where a party objects to the sufficiency of the answers, and seeks to have a *vis à voce* examination under s. 53, he must apply promptly. *Id.*

3. It is no ground for refusing to answer interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions. *Tetley v. Easton*, 643

JOINT STOCK COMPANY.

I. Liability of Directors.

1. The rule which entitles a subscriber to a scheme which proves abortive to recover back his deposit, applies to the case of a company established for the working of a mine upon the cost-book principle. *Johnson v. Goelett*, 728

2. Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l.* each, to be paid up on allotment; and stating that the money was to be paid to Messrs L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of 50 shares, and paid 50*l.* to the bankers, who gave him a receipt describing that sum as having been received by them for the company. The plaintiff afterwards discovering that only 4720 shares had been allotted, and that the deposits had been paid upon 685 shares only, brought an action against the directors to recover back his deposit, on the ground of failure of consideration:—Held, that, although the account in the books of the bankers was kept in the names of five of the directors only, the whole seven were liable. *Id.*

II. Forfeiture of Shares.

1. *Notice*.—By an act incorporating a joint stock company, the directors were empowered to make calls, giving twenty days' notice of the time and place of payment in the London Gazette and in two or more of the daily London newspapers; and it was enacted, that, if any proprietor of shares should neglect or refuse to pay his calls "during the space of three calendar months next after the time appointed for payment thereof," the person so neglecting or refusing should *absolutely forfeit* all his share in the capital stock of the company, and all profits and advantages thereof, to and for the use and benefit of the company; and all shares so forfeited should or might at any time thereafter be sold at a public sale; but that "no advantage should be taken of such forfeiture of any share or shares until after thirty days' notice should have been given by the directors, under the hand of the clerk of the company, to the owner thereof, by notice in writing left at his usual or last place of abode, nor unless the same should be declared to be forfeited at some general or special general meeting of the proprietors which should be held not earlier than three calendar months next after the said forfeiture should happen:—"

Held, no absolute forfeiture until after the thirty days' notice. *Cockerell v. The Van Diemen's Land Company*, 454

2. *Service of Notice*.—A, B., & Co. carried

on business in Austin Friars, A.'s private residence being in Hyde Park Gardens. The firm stopped payment in September, 1847, and in March, 1848, the partnership was dissolved, though the office in Austin Friars was not closed for two or three years after. Upon the stoppage of the firm, A. gave up his private residence, and in May, 1849, he went to reside on the continent. Some time before May, 1852, a board was (but without the knowledge of A.) affixed to the office in Austin Friars, directing that letters and communications for A., B. & Co. should be left at the office of C. Before A. left England, it was the duty of the clerk at the office in Austin Friars to forward all letters addressed to A., which came there, to his residence in Hyde Park Gardens; and, after A. left England, C. gave directions that letters and communications for either of the partners should be forwarded to D. (who had been a member of the firm); and D. gave directions that all letters or communications for A. should be forwarded to E.; but E. had no authority to act for the plaintiff touching his private affairs.

A. was the holder of two hundred shares in the company incorporated by the above-mentioned act, and was one of the directors thereof. At a general meeting held in March, 1851, his shares were declared forfeited for non-payment of calls, and, on the 15th of May, 1852, a notice of the forfeiture, enclosed in an envelope addressed to A., was left with C., with a request that he would "procure the acceptance of service on behalf of A." C. believed he sent it to D., but neither of them had any recollection of having seen it: and it never reached the hands or came to the knowledge of A.:—

Held, not a sufficient service of the notice,—although in the deed of transfer of the shares to him, in the resolution appointing him a director of the company, and in every document signed by him in relation to the affairs of the company, he was described as "of Austin Friars." *Cockerell v. The Van Diemen's Land Company*, 454

3. *Damages*.—And, held, that, in an action against the company for improperly withholding the shares after a tender of the sum due for calls and interest, A. was entitled to recover their value at the market-price of the day of the tender, deducting the amount of calls and interest. *Ib.*

III. Execution against a Shareholder.

Affidavit on Motion for.—Affidavits of a director of the company, stating, that, on a certain day, the company discontinued to carry on its business, and was wholly insolvent, and that its funds, property, and assets were and had since continued totally exhausted, and that there were no funds, property, or assets of or

belonging to the company, or any other means whatsoever for or by which the plaintiff could recover or enforce payment of the judgment debt; and of the sheriff's officer to whom a *fi. fa.* against the company had been delivered for execution, stating that he went to the only place in London where the company had carried on its business, and found the place deserted, and from information and personal inspection ascertained that they had no goods or property there:—Held, sufficient to entitle the judgment-creditor to execution against a shareholder under the 7 & 8 Vict. c. 110, s. 68. *Ridgway v. The Security Mutual Life Assurance Society*, 686

And see RAILWAY COMPANY.

LACHES.

See PRACTICE, VII. 2.

LANDLORD AND TENANT.

I. Evidence of Holding.

1. In an action for rent upon an indenture of lease, the defendant pleaded non demisit. The counterpart was held sufficient evidence of the demise. *Houghton v. Koenig*, 235

2. The defendant further pleaded the bankruptcy of the plaintiff; the plaintiff replied, that he let the premises to the defendant as trustee for J. S., and that he had no beneficial interest therein, and was suing as such trustee:—Held, that his being trustee was not material, as he had shown by parol that he had no beneficial interest in the premises. *Ib.*

II. Duration and Terms of Tenancy.

1. *Valuation as between outgoing and incoming Tenant*.—1. The plaintiff entered upon the occupation of a farm under a written agreement, by which he agreed, amongst other things, "to pay 5*l.* sterling for every load of fodder, straw, haum, dung, or turnips, which should be sold or carried off the premises, and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises;" and also "to purchase all the hay, sanfoin, and tares now in the yard, also all the dung and manure now on the premises, also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides." And the landlord engaged, on the tenant's quitting the farm, to purchase all hay, sanfoin, and tares in the yard, the produce of the farm; also all straw from the crops of the previous harvest that might be on the premises, paying a fair price for the

same, to be ascertained by valuers on both sides:—

Held, that the plaintiff, not being by the terms of the agreement entitled to be paid for the manure at the expiration of his tenancy, was only entitled to be paid for the straw at a fodder price, viz. one-half the market price. *Clarke v. Westrope*, 765

2. Held also, that, the incoming tenant having consumed the straw, and the valuers named by the parties not having agreed upon the valuation, or appointed an umpire, the plaintiff was entitled to maintain an action for it upon a quantum meruit. *Ib.*

3. *Notice to quit.*—A. held premises of B., as tenant for a year, and so on from year to year so long as C. should live, the tenancy commencing at Christmas. After the death of A. (C. being also dead), A.'s widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—Held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice, to expire at Christmas. *Humphreys v. Franks*, 323

III. Distress.

1. The 11 G. 2, c. 19, s. 19, only entitles the tenant to recover in an action for any irregularity in dealing with a distress, where actual damage is proved.

The plaintiff declared in case for an irregular distress, alleging in one count that the defendant having distrained certain growing wheat as a distress for rent, and having caused the same to be cut and carried away, instead of impounding, appraising, and selling the same, suffered other persons to carry the same away and convert the same to their own use, whereby the plaintiff was injured, and was deprived of the surplus.

There was also a count in trover.

The evidence was, that the defendant seized the plaintiff's growing wheat as a distress for rent and sold it (for its full value) on the premises in a growing state,—that the purchaser cut the wheat, and carried it away,—and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff. The jury found that the plaintiff sustained no damage by the transaction:—

Held, that, upon these facts, and upon this finding, the plaintiff was not entitled to recover even nominal damages upon either count. *Rodgers v. Parker*, 112

2. *Proudlove v. Twemlow*, 1 C. & M. 326, observed upon. *Ib.*

IV. Admission of Landlord's Title.

Payment of rent under a distress is not a

conclusive admission of title in the distrainor, but may be rebutted by showing that he never had any title. *Knight v. Cox*, 645

The plaintiff claimed as executrix and devisee of the administratrix of one of three lessors, and showed that rent had been paid by the defendant (the lessee) to her testatrix and to herself,—on two occasions, after distress:—Held, that this *prima facie* case was answered by showing that one of the other lessors was still living. *Ib.*

V. Fixtures.

1. By indenture A. demised to B. a messuage and premises for twenty-one years. The lease contained a covenant to repair, and a covenant that B., his executors, administrators, and assigns should, at the determination of the term, yield up the premises to the plaintiff, his executors, &c., "together with all wainscots, windows, shutters, fastenings, &c., and other things which then were or at any time thereafter should be thereunto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings, and improvements which should be erected, built, or made upon the demised premises, in good repair and condition."

An assignee of the lease, during the term, removed an old shop window, and put up in its place a plate-glass front, but without in any manner fastening it (except by means of wedges) to the premises:—

Held, that, whether an "improvement" within the meaning of the covenant or not, this plate-glass front was at all events a "window" belonging to the demised premises, and therefore that it could not be removed. *Burt v. Haslett*, 162

2. Affirmed, on error in the Exchequer Chamber. *Haslett v. Burt*, 893

VI. Alteration of Premises.

Ten years ago, A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago, A. permitted B. to make a communication through the party-wall, and to make other alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt; and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them:—

Held, that the "damages resulting from the non-compliance with the condition upon which the permission to alter was given," did not constitute "a liability to pay money upon a contingency," within the 178th section of the 12 & 13 Vict. c. 106; and that the condition or agreement above specified, to restore the premises to their previous state, was not a condition or

agreement within s. 154. *Máples, App., Pepper, Resp.,* 177

LETTERS PATENT.

I. *Assignment of Patent.*

By an agreement between A. and B., it was agreed that A. should do all acts necessary (except the advance of money) for the purpose of procuring and perfecting certain letters patent, and should immediately after the same were procured execute an assignment of one third share therein to B.: and B. agreed to pay all fees and disbursements that might be necessary for procuring the letters patent, enrolling the specification, and otherwise in perfecting the same.

By the 16 & 17 Vict. c. 5, s. 2, it is enacted that all letters patent shall be made subject to the condition that the same shall be void, and the privileges thereby granted shall cease and determine, at the end of three years and seven years respectively, unless there be paid before the expiration of the said three and seven years respectively two several sums of 50*l.* and 100*l.* as therein mentioned:—

Held, that the execution of an assignment by A. was the whole consideration for the undertaking of B. to pay the sums mentioned in that section; and, consequently, a condition precedent to his right to sue B. for the non-payment thereof. *Hill v. Mount,* 72

II. *Interrogatories under 17 & 18 Vict. c. 125, s. 51.*

It is no ground for refusing to answer interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions. *Tetley v. Easton,* 643

LIMITATION OF ACTIONS.

Plaintiff abroad.

A. and B., bankers at Frankfort, sued C. on a bill of exchange which became due on the 2d of December, 1848. The defendant pleaded the statute of limitations; to which the plaintiffs replied, that, at the time of the accruing of the causes of action, they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years before the commencement of the action.

In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill and the year 1851; and that his partner, B., had never been in England. Upon cross-examination, he admitted that B. was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—

Held, that this was evidence to go to the jury; and that it was not necessary to call B. himself

to negative his having been in England. *Koch v. Shepherd,* 191

LONDON SMALL DEBTS ACT.

See COUNTY COURT.

LORD TENTERDEN'S ACT.

See STATUTE OF FRAUDS, II. 1.

MARKET OVERT.

A sale by public auction at a horse repository out of the city of London, is not a sale in market overt. *Lee v. Bayes,* 599

MASTER AND SERVANT.

Liability of Master for Injury to a Servant.

1. A master is not generally responsible for an injury to a servant from the negligence of a fellow servant: but that rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. *Tarrant v. Webb,* 797

2. The plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defendant. In leaving the case to the jury, the judge told them, that, if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover:—Held, a misdirection. *Ib.*

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA

I. *Judges.*

Parke, B., resigned, 796.
Bramwell, B., appointed, 796.

II. *Queen's Counsel.*

Cairns, Hugh M'Calmont, 1.
Selwyn, Charles Jasper, 1.

III. *Serjeants.*

Ballantine William, 400.
Hayes, George, 1.
Parry, John Humfrey, 400.
Piggott, Gillery, 1.
Wells, Mordaunt Lawson, 1.

MINE.

I. *Registration of Transfer of Shares.*

1. A transferee of shares in a cost-book mine,

the rules of which require transfers to be registered, in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transfer is registered. *Thomas v. Clark*, 662

2. A. agreed to accept a transfer of shares (in trust) from B. with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without (as the jury found) A.'s authority registered the transfer:—Held, that this unauthorized registration did not render A. liable as a partner for the debts of the company. *Ib.*

II. Interest in Land.

Shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the 4th section of the statute of frauds, in the absence of evidence that the shareholders take a direct interest in the freehold. *Powell v. Jessopp*, 336

III. Measure of Damages.

Upon the breach of a contract for the sale of shares, the proper measure of damages, is, the difference between the contract price and the market price at the time of the breach. *Powell v. Jessopp*, 336; *Walker v. Bartlett*, 845

IV. Obligation on Vender of Shares.

The plaintiff, the owner of 500 shares in a cost-book mine, according to the rules of which the person registered as owner in the cost-book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested the secretary to enter a transfer of the shares from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. The defendant did not cause the shares to be registered in his name; and the plaintiff, in consequence of his name being continued in the cost-book as the owner, was compelled to pay subsequent calls:—

Held, by the Exchequer Chamber, that there was no legal obligation on the defendant to cause the shares to be registered in his name as the owner,—but that there was an implied obligation on him to indemnify the plaintiff against calls made during the time when he was virtually and potentially the owner of the shares. *Walker v. Bartlett*, 845

V. Stamp.

A transfer of shares in a cost-book mine need not be stamped. *Walker v. Bartlett*, 845

VI. Interest in Land.

A contract for the sale of shares in a cost-book mine is not necessarily a contract for an interest in land, within the 4th section of the statute of frauds. *Walker v. Bartlett*, 845

MISDIRECTION.

See NEW TRIAL, I.

MISREPRESENTATION.

See FRAUDULENT REPRESENTATION.

MONEY RECEIVED.

Where maintainable.

A. employed B., a broker at Liverpool, to purchase a security for him, for which purpose he remitted him a letter of credit for 2010*l.* on a bank there, payable to B. or order. C., who had had dealings with B., in the course of which the latter had become indebted to him in 1940*l.*, under pretence of borrowing the money for a few days, and knowing that it was A.'s money, induced B. to part with it, and then insisted upon applying it in discharge of B.'s debt to him:—Held, that A. might recover the amount from C. in an action for money had and received. *Litt v. Martindale*, 814

And see JOINT STOCK COMPANY.

MORTGAGE.

Costs of.

The proposed mortgagee's solicitor has no claim for his charges against the proposed mortgagor where the negotiation for the mortgage goes off through the default of the latter: he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expense. *Wilkinson v. Grant*, 819

NEGLIGENCE.

See ATTORNEY, I.

NEW FOREST.

See PRESCRIPTIVE RIGHT.

NEW TRIAL.

I. *Misdirection.*

1. A., as agent of B., sold a mare to C., and, having no express authority from B. to warrant her, refused to do so, but, at the time of the sale, told C., that, "if the mare was not all right, she was not his." C. thereupon paid the price, which was received by B. The mare proving unsound, C. returned her to A., and sued B. in the county court for a return of the money.

The judge left the following questions to the

jury,—1. Was the mare sound or unsound at the time of the sale?—2. Was there a warranty given by A. to C.?—3. Was the warranty given by the authority of B.?—4. When the mare was sent back to A. was she received by him for B. or for C.?

The jury answered the first and third questions in the negative, and the second in the affirmative; and, to the last, that the mare was not received back by A. on B.'s account.

The judge thereupon entered a verdict for the defendant.

The court directed a new trial, on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound. *Foster, App., Smith, Resp.*, 156

2. A trader, in consideration of advances in cash and goods, assigned all his stock to the defendants, to secure such advances and also a debt previously due to them. The goods so assigned comprised all his property, except some household furniture and book-debts. In an action by the assignees of the trader to recover the value of the goods seized under this bill of sale, the judge left it to the jury, with very strong observations, to say whether they would infer an intent to defeat and delay creditors. The jury having found for the plaintiffs,—the court, thinking they might have been misled by the observations of the learned judge, granted a new trial, the costs to abide the event. *Pennell v. Dawson*, 355

II. Verdict under 20l.

1. In an action for negligently driving against and killing a horse of the plaintiff proved to be worth 30l., the jury,—there being strong evidence to negative negligence on the part of the defendant, and some evidence the other way,—contrary to the opinion of the judge, found for the plaintiff, damages 15l.—The court refused to grant a new trial on the ground of the verdict being perverse. *Hawkins v. Alder*, 640

2. *Semble*, that the 44th section of the Common Law Procedure Act, 1854, which in some measure places the costs, on motions for new trials on the ground of the verdict being against evidence, in the discretion of the court, has not altered the rule which precludes the grant of a new trial in such cases where the damages are under 20l. 16.

NISI PRIUS.

Conduct of Causes at.

The court will not inquire into the authority of counsel to agree to a compromise of a cause at Nisi Prius. *Swinfen v. Swinfen*, 485

NOTICE.

Service of.—See JOINT STOCK COMPANY, II.

ORDER.

I. Under 17 & 18 Vict. c. 125, s. 61.—See PLEADING, I. 4.

II. For Payment of Money, under 1 & 2 Vict. c. 110, s. 18.—See EXECUTION.

PARTNERS.

I. What constitutes a Partnership.

A. and B., who carried on the business of iron-masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to the trustees, upon trust, amongst other things, to carry on the business under the name of "The Stanton Iron Company," and out of the profits to pay interest on mortgages, &c., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts :"—

Held, that, under this deed, the creditors executing it became liable as partners for debts contracted by the trustees in carrying on the trade. *Hickman v. Coz*, 617

II. Covenants between Partners.

Covenant. The first count alleged that the defendant and one L. carried on business in copartnership, and that, by indenture between the defendant and L. of the first part, the plaintiffs of the second part, &c., it was witnessed that the defendant and L., and each of them, granted, assigned, and transferred to the plaintiffs all the copartnership stock, debts, sums of money, and all other the personal estate and effects and property of them the defendant and L. as such copartners. It then averred, that, at the time of the making of the indenture, the defendant was indebted to the copartnership in 240l., being part of the debts, sums of money, and personal estate and effects and property of the defendant and L., as such copartners; and it assigned for a first breach, non-payment of the 240l.

There was a second breach, alleging that, at the time of the making of the indenture, a bill of exchange for 120l., payable to the order of the defendant, and then being in the possession of the defendant, was part of the personal estate

and effects and property of the defendant and L. as such copartners, and that the defendant made default in transferring the said bill of exchange, and the right to the money therein specified, to the plaintiffs, and, after the making of the indenture, incapacitated himself from so doing, and from conferring on the plaintiffs any right or title to receive the money specified in the said bill, by then parting with the possession of the said bill in such manner and on such terms as so to incapacitate himself, and thereby the defendant prevented the plaintiffs from acquiring or having any right or title as aforesaid to the said money, contrary to the said indenture:—

Held, on demurrer,—that there was no implied covenant on the part of the defendant to pay to the plaintiffs the sum due from him to the copartnership, and therefore that the defendant was entitled to judgment on the first breach,—but that there was an implied covenant on his part not to do anything in derogation of his deed, and therefore that the plaintiffs were entitled to judgment as to the second breach. *Aulton v. Atkins*, 249

PARTY AGGRIEVED.

See COPYRIGHT, II. 2.

PASTURE.

Common of.—See PRESCRIPTIVE RIGHT.

PIRACY.

See COPYRIGHT, I.

PLEADING.

Construction of Pleadings.

1. A plea, or other pleading,—whether coming before the court on motion for judgment non obstante veredicto or on demurrer, is to receive a fair and reasonable construction; and, if ambiguous, to be construed most strongly against the party pleading. *Goldham v. Edwards*, 389

2. To an action for work and labour, &c., the defendant pleaded that B. recovered a judgment against the plaintiff, and, being such judgment-creditor, applied for and obtained an order under the 61st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, that the debt due from the now defendant to the plaintiff should be attached to answer the judgment so recovered against the plaintiff by B., that the debt was still unsatisfied, and that the order still remained in force:—Held, a bad plea, for not alleging that the order was served upon, or notice thereof given to, the garnishee. *Lockwood v. Nash*, 536

3. Held, also, that recourse could not be had to the replication for the purpose of curing the defect in the plea. *Lockwood v. Nash*, 536

4. *Quære*, as to the effect of an order *duly served*, as to *binding* the debt in the hands of the garnishee? *Ib.*

5. Plea, demurrer and replication thereto, and demurrer to the replication: the plea being bad,—Held, that the plaintiff was entitled to judgment on the whole record, the first fault being in the plea. *Ib.*

II. Distributive Pleas.

The first count of the declaration stated that a certain song of which the plaintiffs were the proprietors had been sung by a certain eminent singer at certain public concerts, and had acquired great popularity, and became in great demand; that the plaintiffs published it with a likeness of the singer on the outside leaf; and that the defendant, after such publication thereof by the plaintiffs, deceitfully and fraudulently, and without their consent, caused to be printed another song, the music, melody, and words whereof closely resembled the music, melody, and words of the plaintiffs' song, and with an outside leaf bearing the likeness of the same singer, and similar words to those of the plaintiffs' song, with the fraudulent intention of representing and inducing a belief that it was the song of the plaintiffs, and deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers thereof, under the false colour and pretence that it was the song so published by the plaintiffs; whereby the plaintiffs were injured in the sale of their said song.

The second count was substantially the same, but limited to the piratical use of the title-page and devices on the outside leaf of the plaintiffs' song.

The third count stated that the plaintiffs were the proprietors of the copyright in a certain book, and that the defendant, without their consent in writing, wrongfully and injuriously printed for sale divers copies of the said work, contrary to the form of the statute in such case made and provided, whereby the plaintiffs' profits were lessened.

The fourth count charged the defendant with "having in his possession for sale, and selling," divers copies of the work so unlawfully and without the consent of the plaintiffs printed.

The defendant pleaded,—to the whole declaration,—that the song in question was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, in violation of the statute 2 & 3 Vict. c. 12:—

Held, that the plea disclosed no defence as to the charges in the third and fourth counts; and *semble*, that it could not be taken distributively. *Chappell v. Davidson*, 194

PRACTICE.

I. *Misjoinder of Parties.*

A. sued B., C., D., E., F., G., and H., in an action of contract: H. suffered judgment by default; and the evidence failed as against F. and G.:—Held, that it was competent to the judge at Nisi Prius to amend the record, under the 37th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by striking out the names of F. and G., and a proper case for the exercise of his discretion. *Johnson v. Goslett*, 728

II. *Striking out Pleas.*

Motion to strike out embarrassing pleas. *Fountain v. Chamberlain*, 660

III. *Service of Rules.*

Service of a rule under the 60th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, upon the wife of the party, without showing that it came to his knowledge, is not sufficient. *Mason v. Muggeridge*, 642

IV. *Attachment for Disobedience of Rule.*

1. To sustain an attachment for disobedience of a rule of court requiring the party to execute a conveyance, it is not enough merely to serve him with a copy and to show him the original rule: there must be an express demand upon him to do the act which the rule commands him to do. *Swinfen v. Swinfen*, 485

2. This court may issue an attachment for disobedience of a rule drawn up on an order of Nisi Prius at the trial of an issue directed by the Court of Chancery. *Ib.*

And see ATTORNEY, I.

V. *Discharge from Arrest under 1 & 2 Vict. c. 110, s. 3.*

The court will entertain an application for the discharge from custody of a party arrested on a *capias* under the 1 & 2 Vict. c. 110, s. 3, or for the restoration of money deposited on the arrest, where it plainly appears that the plaintiff has no cause of action. *Stammers v. Hughes*, 527

VI. *Inspection of Documents.*

Upon a rule to rescind an order for a review of the master's taxation, it being objected that neither the rule nor the affidavits upon which it was drawn up disclosed what the taxation was.—The court, in the exercise of their discretion under the 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and without imposing any terms, ordered the allocatur to be produced for their inspection. *Ashcroft v. Foulkes*, 261

VII. *Interrogatories under 17 & 18 Vict. c. 125, s. 51.*

1. *Semble*, that the answers to interrogatories under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, ought not to be general, but should answer, or assign reasons for refusing to answer, each interrogatory specifically. *Chester v. Wortley*, 239

2. Where a party objects to the sufficiency of the answers, and seeks to have a *viva voce* examination under s. 53, he must apply promptly. *Ib.*

It is no ground for refusing to answer interrogatories under the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions. *Tetley v. Easton*, 643

VIII. *Right to begin.*

On *Demurrers*.]—Where there are cross-demurrers, the plaintiff's counsel begins. *Barker v. The Midland Railway Company*, 46

PRESCRIPTIVE RIGHT.

Under 2 & 3 W. 4, c. 71, s. 1.

An allotment of waste land was made to A. under an enclosure act, passed in 1810. In respect of this allotment, A. claimed a right of common of pasture in the waste lands, and a right of pannage in the open woods of the New Forest, showing an enjoyment for the full period of thirty years, as of right, and without interruption, mentioned in the 2 & 3 W. 4, c. 71, s. 1:—

Held, that the claim might be defeated by showing the commencement of the enjoyment; and that, by reason of the statutes 9 & 10 W. 3, c. 36, s. 10, and 1 Anne, stat. 1, c. 7, s. 5, the right claimed could not have had any legal origin in a grant from the Crown. *Mill, Claimant, The Commissioner of the New Forest, Objector*, 60

And see EASEMENT, I.

PRESCRIPTION.

See EVIDENCE, III.

PRINCIPAL AND AGENT.

I. *Liability of Agent for Contract made for a named Principal.*

1. Where a contract in writing for the sale of goods is entered into by one who describes himself as agent, and as making the contract "as agent, and on behalf of" his principal, naming him,—the party so making the contract is not personally liable. *Green v. Kopke*, 549

2. In each case it is a question of intention, to be gathered from the terms of the contract;

and, whether the principal be an Englishman resident in this country or a foreigner residing abroad, makes no difference. *Green v. Kopke*, 549

II. *Dismissal of Agent*.—See *CONTRACT*, I. 3.

PRINTER.

Omission of Imprint.

The first count of the declaration stated that a certain song of which the plaintiffs were the proprietors had been sung by a certain eminent singer at certain public concerts, and had acquired great popularity, and became in great demand; that the plaintiffs published it with a likeness of the singer on the outside leaf; and that the defendant, after such publication thereof by the plaintiffs, deceitfully and fraudulently, and without their consent, caused to be printed another song, the music, melody, and words whereof closely resembled the music, melody, and words of the plaintiffs' song, and with an outside leaf bearing the likeness of the same singer, and similar words to those of the plaintiffs' song, with the fraudulent intention of representing and inducing a belief that it was the song of the plaintiffs, and deceitfully and fraudulently, and without the plaintiffs' consent, offered for sale and sold great numbers thereof, under the false colour and pretence that it was the song so published by the plaintiffs; whereby the plaintiffs were injured in the sale of their said song.

The second count was substantially the same, but limited to the piratical use of the title-page and devices on the outside leaf of the plaintiffs' song.

The third count stated that the plaintiffs were the proprietors of the copyright in a certain book, and that the defendant, without their consent in writing, wrongfully and injuriously printed for sale divers copies of the said work, contrary to the form of the statute in such case made and provided, whereby the plaintiffs' profits were lessened.

The fourth count charged the defendant with "having in his possession for sale, and selling," divers copies of the work so unlawfully and without the consent of the plaintiffs printed.

The defendant pleaded,—to the whole declaration,—that the song in question was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, in violation of the statute 2 & 3 Vict. c. 12:—

Held, that the plea disclosed no defence as to the charges in the third and fourth counts; and *semble*, that it could not be taken distributively. *Chappell v. Davidson*, 194

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PROBABLE CAUSE.

See *FRAUDULENT REPRESENTATION*.

PROMOTIONS.

See *MEMORANDA*.

PUBLIC COMPANY.

See *JOINT STOCK COMPANY*.

RAILWAY COMPANY.

I. *Construction of Deed of.*

Power of Directors.—Two companies proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise or sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways," &c. In pursuance of the powers thus conferred upon them, the directors of the two companies agreed to amalgamate and to form one united company, and this agreement was carried into effect by resolutions made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company:—

Held, that the power to amalgamate was vested in the two boards, and that those powers were well and effectively exercised; and that the company so united or amalgamated might maintain an action for calls against a shareholder of either company who had executed the parliamentary contract and subscribers' agreement. *The Cork and Youghal Railway Company v. Paterson*, 414

II. *Liability for Loss of Goods.*

1. To a count charging the defendants, common carriers by railway from London to Southampton and thence to Jersey by steam-vessels, charging them with the loss of a passenger's portmanteau,—the defendants pleaded that the goods contained in the portmanteau were writings, silks, furs, and lace, within the meaning of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the defendants, "then being common carriers by land for hire, to be carried by them, as such carriers by land, over their said railway;" that such delivery was made to the servants of the defendants; that, at the time of such delivery, the value and nature of the said goods were not declared by the plaintiff; and that the non-delivery of the said goods to the plaintiff in the count complained of was by reason of the same being lost by the defendants out of their possession while the same were upon the railway of the defendants, and in their possession and under their care as such carriers

by land as aforesaid:—Held, a good plea. *Pianciani v. The London and South Western Railway Company*, 226

2. To a count alleging that the plaintiff became a passenger by the defendants' railway and steam vessel from London to Jersey, and charging that the defendants refused to carry his portmanteau, containing articles of wearing apparel, paper writings, and documents,—the defendants pleaded a similar plea to the above:—Held, bad on demurrer, the count not alleging a loss of the package. *Ib.*

3. *Felony by Servants.*—A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed:—

Held, no evidence for the jury of the parcel having been stolen by a servant of the company. *The Great Northern Railway Company, App., Rimell, Resp.*, 575

4. Where felony is set up as an answer to a defence under the carriers act, 11 G. 4 & 1 W. 4, c. 68, the question of negligence becomes immaterial. *Ib.*

5. The case of *Butt v. The Great Western Railway Company*, 11 C. B. 140 (E. C. L. R. vol. 73), explained. *Ib.*

III. Rights and Duties of.

An omnibus proprietor who carries passengers and their luggage, for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. *Barker v. The Midland Railway Company*, 46

IV. Contracts under the Railway and Canal Traffic Act, 1854.

1. The 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods. *Simons v. The Great Western Railway Company*, 805

2. And it is for the court to say, upon the whole matters brought before them, whether or not the "condition" or "special contract" is just and reasonable. *Ib.*

3. A condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed,—Held, unjust and unreasonable. *Ib.*

4. *Semble*, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered,"—is just and reasonable. *Simons v. The Great Western Railway Company*, 805

5. A condition, that, in the case of goods conveyed at a special or mileage rate, the company will not be responsible for any loss or damage, however caused,—is just and reasonable. *Ib.*

6. A case sent by a county court judge for the opinion of this court, stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff,—“Risk note. London and North Western Railway Company. Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners. Delivered to London and North Western Railway Company, from R. C. Dunham (the plaintiff), three crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk.”—Held, that the court could not from this statement judge whether or not the condition was “just and reasonable,” within the 17 & 18 Vict. c. 31, s. 7. *The London and North Western Railway Company, App., Dunham, Resp.*, 826

REASONABLE CAUSE.

See FRAUDULENT REPRESENTATION.

RULE.

Service of.—*See PRACTICE*, III.

SALE.

I. *Of Goods.*—*See STATUTE OF FRAUDS*, II.

And see MARKET OVERT.

II. Warranty.

A., as agent to B., sold a mare to C., and, having no express authority from B. to warrant her, refused to do so, but, at the time of the sale, told C., that, “if the mare was not all right, she was not his.” C. thereupon paid the price, which was received by B. The mare proving unsound, C. returned her to A., and sued B. in the county court for a return of the money.

The judge left the following questions to the jury,—1. Was the mare sound or unsound at the time of the sale?—2. Was there a warranty given by A. to C.?—3. Was the warranty given by the authority of B.?—4. When the mare was sent back to A. was she received by him for B. or for C.?

The jury answered the first and third questions in the negative, and the second in the

affirmative; and, to the last, that the mare was not received back by A. on B.'s account.

The judge thereupon entered a verdict for the defendant.

The court directed a new trial, on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound. *Foster, App., Smith, Resp.*, 156

SHIPPING.

Evidence of Ownership.

1. The register is no evidence of ownership, so as to fix the party whose name appears thereon for contracts entered into on behalf of the ship by the master. *Myers v. Willis*, 886

2. A. advanced money to the owner of a vessel at sea, receiving from him by way of security a bill of sale of the ship, accompanied by a letter as follows:—"You have this day (August 1st, 1851) given me your acceptance for 1000*l.* against the inward freight of my barque the Celt, which vessel I am expecting will load home from the Pacific; and it is understood she is to be consigned to you inwards on arrival, and you are to reimburse yourself from her inward freight accordingly. Meanwhile, as collateral security, I have executed a bill of sale of the vessel to you, which you can get duly registered; and, on the return of the vessel to this country, and the due repayment to you of the above-mentioned sum of 1000*l.*, the vessel is to be again returned to me." A. registered the bill of sale on the 2d of August, 1851:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the register was per se no evidence of ownership; but that the court might look at all the circumstances, to see whether it was the intention of the parties, at the time of giving the bill of sale, that A. should become the absolute owner of the ship, so as to be liable for contracts entered into by the captain for the benefit of the ship, or whether he was to take her merely as security for his advance. *Id.*

And see CHARTER-PARTY.

SIMONY.

What amounts to.

To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory-house and premises, B. pleaded, that A., being rector of C., and B. incumbent of D., it was agreed between them, with the consent of their respective patrons and diocessans, that they should exchange their respective livings in their then state and condition, "and that the plaintiff should not call upon the defendant to pay for the repairs in the declaration mentioned, or for any or either of them:—"

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the plea did not necessarily disclose a simoniacal contract. *Goldham v. Edwards*, 339

SLANDER.

See DEFAMATION.

STAMP.

I. Evidence of Stamping.

An unstamped charter-party was within the fourteen days allowed by the 5 & 6 Viet. c. 79, s. 21, for stamping such instruments without a penalty, delivered at the office of the sub-distributor of stamps at C, for the purpose of its being transmitted to London to be stamped, the proper amount of stamp-duty and postage being left with it. The clerk in that office to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands: but they said, that, if it did, it would in usual course be returned to the district-office in the country. The clerk at C. could not say whether the document was returned to him or not; but he stated, that, on search being made for it, no trace of it could be discovered:—

Held, that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents. *Clo-madene v. Carrol*, 36

II. On Transfer of Mining Shares.

A transfer of shares in a cost-book mine need not be stamped. *Walker v. Bartlett*, 845

STATUTE OF FRAUDS.

I. Section 4.—Interest in Land.

1. Shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the 4th section of the statute of frauds, in the absence of evidence that the shareholders take a direct interest in the freehold. *Powell v. Jessopp*, 336

2. A contract for the sale of shares in a cost-book mine is not necessarily a contract for an interest in land, within the 4th section of the statute of frauds. *Walker v. Bartlett*, 845

II. Section 17.—Sale of Goods.

1. The 17th section of the Statute of Frauds, 29 C. 2, s. 3, and the 7th section of Lord Ten-terden's Act, 9 G. 4, s. 14, are to be read together. *Harmas v. Reece*, 587

2. A contract for the sale of goods of the value of 10*l.* or upwards, is not the less within

the 17th section of the Statute of Frauds because it also embraces something to which the statute does not extend. *Harman v. Reese*, 587

3. Therefore, where it was agreed by parol, between A. and B., that A. should sell B. a mare and foal, and should at his own expense keep them until a certain day, and that A. should also for a given time keep and feed a mare and foal belonging to B., and that in consideration of all this, B. should fetch away A.'s mare and foal on the day named, and pay him 30*l.* :—Held, that this, so far as it related to the sale of A.'s mare and foal, was a contract within the 17th section of the Statute of Frauds, and void for want of writing,—no point having been made at the trial as to the value. *Ib.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

SUGGESTION.

To deprive Plaintiff of Costs.—*See* COUNTY COURT, II.

TRADE-MARK.

See COPYRIGHT, I.

TRADING CORPORATION.

See CORPORATION.

TRANSFER.

See MINE.

TROVER.

Evidence of Conversion.

1. To entitle the owner of stolen property to maintain an action for converting it against a third person, in whose possession he finds it, it is not necessary that he should first have prosecuted the felon. *Lee v. Bayes*, 599

2. A. having bona fide purchased a stolen horse at a public auction (not being market overt), sent it for sale to a repository for horses kept by B. The owner of the horse finding it there demanded it of B. in the presence of A., when B. refused to deliver it up to him :—Held, evidence of a joint conversion. *Ib.*

TRUST DEED.

Construction of.

A. and B., who carried on the business of iron-masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should

execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to the trustees, upon trust, amongst other things, to carry on the business under the name of "The Stanton Iron Company," and out of the profits to pay interest on mortgages, &c., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts :—"

Held, that, under this deed, the creditors executing it became liable as partners for debts contracted by the trustees in carrying on the trade. *Hickman v. Cox*, 617

TRUSTEE.

See BANKRUPT, III.

TURN TO LOAD.

See CHARTER-PARTY.

UNITY OF POSSESSION.

See EASEMENT, I.

VALUATION.

I. *Where complete.*

By agreement between A. and B. it was agreed that B. should buy of A. a certain plant, materials, and tools, "at a valuation to be made by A. and a person to be appointed by B.," and that B. should pay for the same by a bill for 150*l.* at two months from the valuation, and by another bill for the balance of the valuation at three months after date.

Under this agreement, B. was let into possession, and A. and one J. (who represented B.) met and proceeded to value, having a list of the articles to be valued, as to all of which, except certain timber, the prices were finally agreed upon; but, as to the timber, the price per foot and the superficial measurement only were agreed upon, the calculation of the cubical contents and the carrying out the amount being left to be filled in by B.'s foreman. A. and J. never met again, and did not agree upon the sum total; but B. (after action brought for it) paid the 150*l.* :—

Held, sufficient evidence to warrant the jury in finding that a valuation had been made by A. and J. *Gordon v. Whitehouse*, 747

II. *As between outgoing and incoming Tenant.*—*See* LANDLORD AND TENANT, II. 1.

VOLUNTARY CONVEYANCE.*See* **BANKRUPT, I.****WARRANTY.***See* **CHARTER-PARTY.**
SALE, II.**WASTE.***Evidence of Acts of Ownership.*

Upon a question whether a piece of waste land lying between a highway and the plaintiff's enclosed land belonged to the plaintiff, or to the lord of the manor:—Held, that grants by the lord of other slips of waste land on either

side of the same road, abutting on enclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the locus in quo was part of the waste of the manor, without showing continuity. *Dendy v. Simpson*, 831

WASTE LAND.*See* **PRESCRIPTIVE RIGHT.****WAY, RIGHT OF.***See* **EASEMENT, I.****WINDOW.***See* **LANDLORD AND TENANT, V.****END OF THE SERIES.**

